87 - 1246

No. _____

Supreme Court, U.S.
FILED
JAN 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF ARIZONA,

Petitioner,

—v—

STEVEN FELD, LARRY CHABLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Does Arizona's RICO statute, which provides for seizure of profits, proceeds and assets of racketeering enterprises, act as an unconstitutional prior restraint when used to seize nonobscene communicative matter?

2. Can a state, after a conviction based on obscenity as a predicate offense, constitutionally seek forfeiture of assets of the corrupt business which have not been adjudged obscene?

3. Can a state constitutionally order divestiture from racketeering enterprises which have been convicted of the illegal sale of obscene material?

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IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF ARIZONA,

Petitioner,

v.

STEVEN FELD, LARRY CHABLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

Petitioner, the State of Arizona, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Arizona Court of Appeals.

OPINIONS BELOW

The Maricopa County Superior Court of the State of Arizona dismissed the

indictment based on obscenity as a predicate offense for a state RICO violation. The decision of the Arizona Court of Appeals vacating the trial court's dismissal of the indictment, but limiting the use of obscenity in RICO cases, is attached in the Appendix at A-34 and is published at 745 P.2d 146 (Az.App. 1987). The Arizona Supreme Court's denial of a petition to review the Court of Appeals' opinion is attached in the Appendix at A-71.

JURISDICTION

The opinion and judgment of the Arizona Court of Appeals were filed on August 4, 1987. The Arizona Supreme Court denied a petition for review on December 1, 1987. This Petition seeks review of the decision of a state court of last resort. This Court has jurisdiction to grant this Petition under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution are set forth in the Appendix at pages A-1 and A-2, respectively. Article 2, Section 6 of the Arizona Constitution is set forth in the Appendix at A-3. Arizona's Organized Crime and Fraud statute (RICO), Arizona Revised Statutes sections 13-2301, et seq., is set forth in the Appendix at A-4. Arizona's obscenity code, Arizona Revised Statutes sections 13-3501 et seq. is set forth in the Appendix at A-27.

STATEMENT OF THE CASE

This case presents issues of national significance in the continuing effort to battle organized crime. A state law which provides for obscenity to be a racketeering offense, similar

to many other state laws and modeled after the federal RICO law, has been held by a state court to violate the First Amendment to the federal Constitution.

Arizona's Organized Crime and Fraud statute is patterned after the federal Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. sec. 1961 et. seq, which is designed to provide a means for attacking the economic base of organized crime. RICO authorizes enhanced criminal penalties and civil sanctions for criminals convicted of engaging in a "pattern of racketeering activities," which can be shown by proving at least two of a broad range of crimes, including inter alia, murder, kidnapping, arson, dealing in narcotics, federal mail fraud, counterfeiting, and "dealing in obscene matter." Once the pattern of

racketeering activity is shown, RICO authorizes forfeiture of ill-gotten profits, proceeds and interests, as well as forfeiture of locations used by illegal enterprises. Persons can also be compelled to divest themselves of an interest in an enterprise. RICO is designed to attack the profitability of organized crime by seizing the "fruits and instrumentalities" of crime.

Realizing that profits from the sale of obscene material were funding much organized crime activity, Congress amended RICO to include obscenity as a predicate offense in 1984. In 1985, Arizona followed suit by amending its Organized Crime and Fraud section to include obscenity as a predicate offense.

This case results from the dismissal of an indictment under that

Arizona law against two men for racketeering through the sale of obscene material. Steven Robert Feld and Larry D. Chabler were charged with "Conducting an Illegal Enterprise," a Class 3 felony in Arizona. Chabler also was charged with one count of "Sale of an Obscene Item" while Feld was charged with three counts of "Sale of an Obscene Item."

Chabler and Feld filed a motion to dismiss the charge of "Conducting an Illegal Enterprise," asserting inter alia that the RICO charge could not be applied to obscenity prosecutions without violating constitutional guarantees of freedom of press and speech. The trial court granted the motion to dismiss and gave reasons for the dismissal. The State appealed.

The trial court granted a motion to delay trial on the other counts pending resolution of the appeal.

The Arizona Court of Appeals vacated the trial court's dismissal, but held unconstitutional, as violative of the First Amendment, major provisions of the law when used in obscenity proceedings. The Court ruled unconstitutional sections which, following a racketeering conviction in an obscenity case: (1) order the criminal to divest of any interest in the enterprise, (2) restrict the criminal from future activities or investments in the same enterprise, (3) order dissolution and reorganization of the enterprise, (4) empower courts to order forfeiture of interests or proceeds in an enterprise, to the extent those profits are derived from

the sale of material not adjudged obscene, and (5) empower courts to seize property used to facilitate an offense, unless that property is itself contraband or traceable to racketeering proceeds. (See opinion of Arizona Court of Appeals, attached in the Appendix at A-34.) The Court declined to declare the entire Organized Crime and Fraud scheme unconstitutional.

The state appealed to the Arizona Supreme Court, which denied a petition for review.

REASONS FOR GRANTING THE WRIT

1) THE QUESTION WHETHER THE FIRST AMENDMENT PREVENTS STATES FROM USING RICO IN OBSCENITY PROCEEDINGS HAS BEEN ANSWERED DIFFERENTLY IN OTHER JURISDICTIONS, IS LIKELY TO COME BEFORE MANY MORE JURISDICTIONS, AND SHOULD BE SETTLED BY THIS COURT SO THAT EACH JURISDICTION WILL NOT HAVE CONTRASTING VIEWS ON THE FUNDAMENTAL PROTECTIONS PROVIDED BY THE CONSTITUTION.

The Arizona Legislature and the legislatures of at least thirteen other states and Puerto Rico, along with the Congress of the United States, have decided to deal with the illegal profits collected by organized crime through the sale of obscene material by making obscenity a predicate offense to violation of racketeering laws.[1] Several more states make child pornography a predicate offense to racketeering.[2] There is now a strong

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[1] 18 U.S.C. § 1961; Ariz. Rev. Stat. Ann. § 13-2301; Cal. Penal Code § 186.2 (West); Colo. Rev. Stat. § 18-17-103; Conn. Gen. Stat. § 53-394; Del. Code Ann. tit. 11, § 1502; Fla. Stat. § 895.02; Ga. Code Ann. § 16-14-3; Idaho Code § 18-7803; Ind. Code § 35-45-6-1; N.J. Rev. Stat. § 2C: 41-1; N.D. Cent. Code § 12.1-06.1-01; Or. Rev. Stat. § 166.715; Utah Code Ann. § 76-10-1602; Wash. Rev. Code § 9A.82.010; P.R. Laws Ann. tit. 25, § 971a(b).

[2] Haw. Rev. Stat. § 842-1; N.Y. Penal Law § 460.10 (McKinney); Ohio

FOOTNOTE CONTINUED ON NEXT PAGE

movement for other states to pass RICO and forfeiture statutes, a movement given impetus by the recommendations of the Attorney General's Commission on Pornography that states use RICO to get at the organized crime underpinnings of the illegal market in obscene (hard-core) material.[3] Additionally, law enforcement personnel are beginning to use RICO and forfeiture statutes more frequently in both state and federal obscenity prosecutions.[4] This trend is also partly attributable

FOOTNOTE 2 CONTINUED

Rev. Code Ann. § 2923.311(2)(b) (Anderson); R.I. Gen. Laws § 7-15-1; Wis. Stat. § 946.82.

[3] Final Report, Attorney General's Commission on Pornography, Vol. 1, Recommendations 9 and 10 at 497-98.

[4] Reuben Sturman, considered the largest distributor of hard-core pornography in the world and long known

FOOTNOTE CONTINUED ON NEXT PAGE

to the recommendations of the Attorney General's Commission on Pornography,[5] and has been accelerated by the creation of a special National Obscenity Enforcement Unit in the U.S. Department of Justice.

The result of this greater use of RICO and forfeiture in obscenity proceedings is more court cases to adjudicate the same issue.

In their attempt to interpret the First Amendment on the fundamental question whether use of RICO and forfeiture in obscenity proceedings

FOOTNOTE 4 CONTINUED

to have ties to organized crime, was indicted with four associates October 7 by a Nevada federal grand jury on charges of interstate shipment of obscene materials and operating a racketeering enterprise. United States v. Sturman, et al., CR-S-87-278 (D. Nev. 1987).

5 Final Report of the Attorney General's Commission on Pornography, Vol. 1, Recommendation 15 at 515.

creates an unconstitutional prior restraint on expression, the Arizona Court of Appeals has reached a decision in contradiction to other jurisdictions. The Indiana Supreme Court has decided that it "is irrelevant whether assets acquired through racketeering activity are obscene or not. They are subject to forfeiture if the elements of a pattern of racketeering activity are shown." 4447 Corp. v. Goldsmith, 504 N.E.2d 559, at 564 (Ind. 1987) But the Arizona Court of Appeals held that "... profits from the sales of protected materials--i.e., items not adjudged obscene--could not be seized." State v. Feld, 745 P.2d 146, at 155 (Az.App. 1987). The Indiana Supreme Court held that other bookstores could be ordered closed and items seized until a determination of the items'

obscenity was made,[6] while the Arizona court ruled that "(a)ny order requiring action such as forfeiting any property of the business, forfeiting a defendant's interest therein, or closing the business, prior to determination of liability, would be an impermissible prior restraint." State v. Feld, 745 P.2d 146, at 154. Meanwhile a federal court in Georgia found "no significant infringement of First Amendment rights" by seizure of material from a bookstore under Georgia's RICO statute, Western Business Systems, Inc. v. Slaton, 492 F.Supp. 513, 515 (N.D.Ga. 1980), and a federal court in Virginia ruled that "(o)nce it is decided that obscenity does not merit First Amendment protection ... then a subsequent

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6 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987).

punishment, like RICO's forfeiture scheme, is a sensible and wholly legitimate law enforcement weapon." U.S. v. Pryba, Crim.No. 87-00208-A (E.D.Va. 1987) (copy in Appendix at A-73).. The Supreme Court of Florida also has upheld the constitutionality of the use of obscenity as a racketeering offense. Bowden v. State, 402 So.2d 1173 (Fla. 1981).

All these decisions are attempts by lower courts to interpret the same provision of the Constitution under virtually identical circumstances. If this Court does not take up the issue, but allows the Arizona decision to stand, there will be no uniformity. As more state and federal prosecutors use RICO in obscenity proceedings, cases will be brought in more and more jurisdictions, and lower courts will

continue to construe the Constitution with no clear guidance. Thus the profits of hard-core pornographers will receive more "constitutional" protection in some jurisdictions than in others.

This Court should settle the issue now, so that hard-core pornographers will cease bringing broad challenges to the use of RICO, or conversely, prosecutors will stop using obscenity as a predicate offense in racketeering cases. This Court should not allow lower courts to interpret the First Amendment so very differently on this fundamental question.

2) THE ARIZONA COURT OF APPEALS' INTERPRETATION OF THE FIRST AMENDMENT CONFLICTS WITH DECISIONS OF OTHER COURTS AND DEFEATS THE INTENT OF STATE LEGISLATURES AND CONGRESS BY EMASCULATING USE OF RICO IN OBSCENITY PROCEEDINGS.

The Arizona Court of Appeals decision emasculates the use of RICO

and defeats the intent of Congress and many legislatures to provide a tool for attacking the economic base of organized crime activity.

It is accepted that, where possible, courts should give statutes a constitutional construction. Brockett v. Spokane Arcades, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394, at 405 (1985). But the Arizona court, in seeking to save this statute, destroys its force. Every law is constitutional that has no effect. The court has so narrowed the use of RICO in obscenity cases as to render the statute impotent.

Congress and Arizona added obscenity to their RICO statutes in order to fulfill the goals of RICO - fighting organized crime - not as a device to suppress protected material

or to chill protected speech.[7] Several reports, including the California Attorney General's 1987 report on Organized Crime in California and the Final Report of the Attorney General's Commission on Pornography, have concluded that organized crime is behind most of the production and distribution of illegal, obscene pornography. The California report estimated that nationwide revenues from pornography range from $7 billion to $10 billion annually, "and organized crime is believed to be connected to

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[7] 1 CONG.REC. s433-458 (daily edition, Jan. 30, 1984) (statement of Sen. Helms). Senator Helms, in introducing the amendment that added "dealing in obscene matter" to the RICO statute, put into the record material showing the profits organized crime gains from the sale of illegal obscenity, and reiterated that RICO was intended to provide "a means of dealing with organized crime." Id. at s433.

most of this money." Attorney General's Report on Organized Crime in California at 7 (1987). It also concluded that "pornography was a lucrative part of organized crime operations" in California in 1986. Id. The Attorney General's Commission on Pornography endorsed the FBI's 1978 findings that "... organized crime involvement in pornography ... is indeed significant, and there is an obvious national control directly, and indirectly, by organized crime figures of that industry in the United States. Few pornographers can operate in the United States independently without some involvement with organized crime.... The huge profits gathered by organized crime in this area and redirected to other lucrative forms of crime, such as narcotics and investment

in legitimate business enterprises, are certainly cause for national concern ..." Final Report of the Attorney General's Commission on Pornography, at 1071. These conclusions were important factors in the decisions of Congress and Arizona to amend their RICO statutes and include obscenity as a predicate offense.

The purpose of the federal RICO statute is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983). Its provisions are to be construed liberally to bring about its remedial purposes. United States v. Turkette, 452 U.S. 576 (1981). One of the most important of those remedies is the forfeiture of assets. Russello, supra. But the

Arizona Court of Appeals decision does not construe the statute liberally, nor does it allow the forfeiture provision to stand.

Use of RICO statutes in obscenity proceedings does not unconstitutionally restrain speech. Defendants may continue to sell or exhibit non-obscene material as long as they do not use the proceeds, instrumentalities, or property of past criminal activities.

The reasoning of the Arizona Court of Appeals, put into practice, leads to absurd results. Under its ruling, if a premises is used to sell narcotics or forged documents, but also sells magazines, that property is immune from forfeiture and the "enterprise" cannot be dissolved. Racketeers may now enter the magazine business to avoid RICO forfeitures.

The record makes clear that the State does not seek through RICO to restrain future expressive activities, but seeks the dissolution of an "enterprise" or forfeiture of property because of past criminal conduct.[8] The penalties are imposed for reasons unrelated to the suppression of speech.

Some inconvenience to speech is caused by all criminal laws, including RICO. In every case where a person is imprisoned for distributing obscenity, the imprisonment limits that criminal's ability to distribute communicative material, as two justices of this Court noted in Vance v. Universal Amusement Co., 445 U.S. 308, at 320, 324 (1980) (Justices White and Rehnquist,

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[8] Obscenity is not protected speech. Roth v. United States, 354 U.S. 476 (1957). "Hence Congress may declare it contraband ...." U.S. v. 37 Photographs, 402 U.S. 363, 376-77 (1971).

dissenting). See also Arcara v. Cloud Books, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) (...every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities." 92 L.Ed.2d at 577) But under the Arizona ruling, a person could engage in the RICO predicate offenses of prostitution, restraint of trade, or trafficking in stolen property at a commercial establishment which also sells paperback novels, and that would immunize the establishment from forfeiture. Such a ruling provides a loophole for organized crime to avoid the intended impact of RICO and defeats the purpose of the statute.

This Court has repeatedly recognized that it does not abridge freedom of speech to make a course of

conduct - in this case racketeering - illegal, even though the conduct is in some respect carried out by means of expression. Cox v. Louisiana, 379 U.S. 559, at 563 (1966) ("...it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." Quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490 at 502, 93 L.Ed. 834 at 843-44 (1949))

In Arcara v. Cloud Books, supra this Court upheld the closure of a pornography bookstore that was also used as a place of prostitution. Like the Arizona RICO statute, the nuisance abatement legislation in Arcara was

concerned with unlawful conduct and only incidentally related to expression. This decision, ignored by the Arizona Court of Appeals, would seem to control our case: "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal use of premises." 92 L.Ed.2d at 578. This Court rejected the same First Amendment prior restraint analysis embraced by the Arizona Court of Appeals. So long as there is no "speech suppressive motivation or policy" shown in the enforcement of the RICO statute it is constitutional. 92 L.Ed.2d at 578, N.4 (emphasis added). The Arizona RICO statute is applicable to all enterprises or property used in racketeering activity - not just

bookstores. Just because enforcement will result in some incidental impact on expressive conduct is not enough to force invalidation of the statute.

The Indiana Supreme Court recognized this and rejected a constitutional challenge to Indiana's RICO statute. 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987). The Court reasoned that "the purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question." 504 N.E.2d at 565. The remedies provided in RICO "are a legitimate tool in the attack on racketeering activity." Id. To find otherwise would allow persons to thwart the law by effectively shielding their enterprise "behind a pseudo-constitutional barrier." Id. Because RICO is an attempt to compel

forfeiture of property used in racketeering activity and "not to restrain the future distribution of expressive materials" the Court held that RICO, as it pertains to the "predicate offense of obscenity" does "not violate" the First Amendment. Id. The Arizona Court of Appeals disregarded Goldsmith and adopted the analysis of the Indiana Court of Appeals, reversed by the Indiana Supreme Court. See 4447 Corp. v. Goldsmith, 479 N.E.2d 578 (Ind.App. 1985), reversed at 504 N.E.2d 559 (Ind. 1987)

Where the purpose of a statute is unrelated to the suppression of speech, as with RICO, there are many circumstances which permit closure of businesses engaged in expressive activity:

Closure of nonconforming adult bookstores and theatres is permitted under amortization provisions of "adult use" zoning ordinances. Hart Bookstores v. Edmisten, 612 F.2d 821, 830 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980); Northend Cinema Inc. v. Seattle, 585 P.2d 1153, 1160 (1978), cert. denied sub. nom. Apple Theatre v. Seattle, 441 U.S. 946 (1979). The denial of a license to open or operate an adult bookstore or theatre has been upheld where denial was based on a prior prostitution, child pornography, indecent exposure, or obscenity conviction. Dumas v. City of Dallas, 648 F.Supp. 1061, 1073 (N.D.Tex.1986) (relying on Arcara, supra); also see 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert.

denied, 422 U.S. 1044 (1975); Barrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D.Ky. 1978); Airport Bookstore, Inc. v. Jackson, 248 S.E.2d 623 (Ga. 1978), cert. denied sub. nom. Gateway Books v. Jackson, 441 U.S. 952 (1979); West Gallery Corporation v. Salt Lake City Board of Commissioners, 586 P.2d 429 (Utah 1978). In Commonwealth v. Croatan Books, 323 S.E.2d 86 (Va. 1984), the Virginia Supreme Court upheld a bookstore's closure based on evidence that homosexuals congregated there to engage in sexual acts - even though there was "no evidence" that the store sold obscene material - because the closure was "based on criminal activities occurring at the site." 323 S.E.2d at 89.

Many other cases have upheld closure of bookstores under abatement

of nuisance statutes because of illegal conduct unrelated to expression. See e.g. Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975), dismissing the appeal from State ex rel. Ewing v. "Without a Stitch", 307 N.E.2d 911 (Oh.1974) (this Court upheld the Ohio Supreme Court ruling that a one-year closure provision was a constitutionally permissible method of controlling obscenity.); State, ex rel. Kidwell v. U.S. Marketing, Inc., 631 P.2d 622, 25 ALR 4th 381 (Id. 1983), jurisdiction noted 454 U.S. 1140, 71 L.Ed.2d 291, 102 S.Ct. 996, and appeal dismissed by U.S. Marketing, 455 U.S. 1009, 71 L.Ed.2d 878, 102 S.Ct. 1649 (the Supreme Court of Idaho held that a one-year closure order under a nuisance abatement statute for a leased bookstore property did not

constitute an unlawful prior restraint on speech.)[9] These cases, like ours, are situations where speech is interfered with incidentally during punishment for past illegal conduct.

Simply because a person's speech is restrained or inconvenienced as the unintended and incidental result of a legitimate statute does not create an unconstitutional prior restraint on speech. As with most criminal

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[9] This Court sought to address the issue of closure as a remedy in obscenity nuisance orders in Kidwell, supra, jurisdiction noted, 454 U.S. 1140 (1982). After an arson fire destroyed the bookstore, its owners filed for unilateral dismissal of their appeal, which was granted by the Clerk over the objection of the State of Idaho. 455 U.S. 1009 (1982). This was not a dismissal "by stipulation of parties," as indicated in Avenue Book Store v. City of Tallmadge, Ohio, 459 U.S. 997, 74 L.Ed.2d 393 at 394 (1982) (Justice White dissenting from denial of writ of certiorari). See also: U.S. Marketing v. Leroy, 524 F.Supp. 1277 (D.Idaho 1981).

statutes, every one of the predicate offenses under Arizona's RICO statute can arguably result in incidental suppression of speech. This is particularly so if the property used in the racketeering activity is a store that sells books. The Arizona Court of Appeals' interpretation of the First Amendment would lead to the absurd consequence of invalidating use of RICO whenever criminals put their money into such an enterprise, and for that reason should be overturned. United States v. Powers, 307 U.S. 214, 217, reh'g denied, 308 U.S. 631 (1939).

The criminal nature of an "enterprise" can be proven as neutrally through sale of illegal obscenity as through sale of illegal drugs, guns, or forged documents. As long as the legislation is directed at unlawful conduct, and not motivated by

suppression of speech, its purpose cannot be frustrated because the criminal activity is intertwined with expression. Arcara, supra; Goldsmith, supra. This is true no matter what the predicate offense. Once an enterprise is proven corrupt, it should be subject to RICO sanctions no matter what crime it was involved in to become corrupt.

The Arizona Court of Appeals' reasoning is based on an erroneous understanding of the present state of First Amendment law and a failure to apply this Court's applicable decisions. This Court should accept this Petition and overturn the Arizona Court of Appeals.[10]

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[10] Petitioner expects the decision of the Indiana Supreme Court in 4447 Corp v. Goldsmith, 504 N.E.2d 559 (Ind. 1987) to be appealed to this

FOOTNOTE CONTINUED ON NEXT PAGE

III. FIRST AMENDMENT INTERESTS ARE ADEQUATELY PROTECTED BY FORCING THE PROSECUTION TO PROVE THE PREDICATE OFFENSE OF OBSCENITY BEFORE DEFENDANTS CAN BE CONVICTED OF RACKETEERING.

It is useful to remember that no one can be charged with racketeering in this context until they have been proven guilty of selling illegal, constitutionally unprotected material. Prosecutors must independently meet, at a constitutional minimum, the rigid three-part test of Miller v. California, 413 U.S. 15 (1973), under

FOOTNOTE 10 CONTINUED

Court by a jurisdictional statement, thus requiring the Court to rule on the merits of this issue. Because the Indiana defendants chose to surrender their right to a direct appeal by filing a Petition for a writ of certiorari, (pending sub. nom. Fort Wayne Books, Inc. v. Indiana, Case No. 87-470) the State of Arizona has no assurance this Court will resolve these compelling issues unless the Court grants this Petition to review the decision of the Arizona Court of Appeals. See also Sappenfield, et al. v. Indiana, pending Case No. 87-614.

which the material must: 1) appeal to the prurient interest; 2) depict sexual conduct described specifically in a statute in a patently offensive way; and 3) lack serious literary, artistic, political or scientific value. 413 U.S. at 24.

By forcing prosecutors to meet that initial burden, it is established that the criminals are engaged in the sale of illegal, unprotected material. At that point, if the prosecutor can prove the additional elements for a racketeering offense, the criminal is guilty of racketeering and subject to the full sanctions of RICO. It should make no difference what "occupation" the criminal is engaged in, or what establishment the profits have been poured into. Members of this Court have from time to time expressed concern over the difficulty involved in

deciding where to drawn the line between protected expression and obscenity. This Court in Miller gave the American people a complex definition of obscenity, and one that is extremely sensitive to First Amendment values.

Yet the problem of obscenity remains. Nearly three out of four Americans would like to see stricter laws and more enforcement of existing laws against the sale of obscene, hard-core pornographic material.[11] Part of the reason that sale of this illegal material has not been more effectively curtailed is its profitability in the hands of organized crime. As noted above, the entire pornography industry may be grossing between $7 and $10 billion annually

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[11] "Pornography: A Poll," Time, July 21, 1986 at 22.

with the hard-core segment of that controlled by organized crime.[12] This State takes the position that RICO should only be limited to prosecutions of hard-core type of obscenity traffic.

The addition of obscenity as a predicate offense in RICO statutes is a response to this problem. By upholding the constitutionality of using RICO in hard-core obscenity cases, this Court can assist the prosecution of illegal, unprotected material, with no deletorious effect on important First Amendment principles. This Court can do for the availability of illegal obscenity what it did for the availability of illegal child pornography in New York v. Ferber,

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[12] See generally the Attorney General's Report on Organized Crime in California (1987); Final Report of the Attorney General's Commission on Pornography (1986).

458 U.S. 747 (1982). In Ferber, this Court upheld the constitutionality of restrictions on the sale, exchange, receipt and possession of child pornography. 458 U.S. at 764. As a result of Ferber, and as a result of the desire of many states to eliminate child pornography, this Court receives few child pornography cases and there is no public market in the sale of child pornography.

Here, as in Ferber, many states have responded to the grotesque profits earned by organized crime through the sale of hard-core obscenity by using RICO statutes. By upholding the constitutionality of that use, this Court can assist in the elimination of the public market in illegal material without altering the test for obscenity and without offending First Amendment principles, thus cutting substantially

into organized crime's power, influence and wealth.

IV. ARIZONA'S CONSTITUTIONAL PROTECTION OF SPEECH AND PRESS IS BASED ON AND EQUAL TO THAT PROVIDED BY THE FIRST AMENDMENT, AND ARIZONA COURTS HAVE ALWAYS READ THEIR PROTECTIONS COTERMINOUSLY. THIS COURT'S EXPLANATION OF FIRST AMENDMENT PROTECTIONS WILL GUIDE ARIZONA COURTS IN THEIR INTERPRETATION OF THE ARIZONA CONSTITUTION.

Appellees will argue that even if the Arizona Court of Appeals decision wrongly interprets the federal Constitution its decision rests separately on the protections provided by Article 2, Section 6 of the Arizona Constitution. This position is unsupportable.

Arizona courts have no policy or practice of striking statutes or upholding claims based upon independent state constitutional guarantees of freedom of speech and press. In freedom of speech or press cases that

has been brought in Arizona under both the federal and state constitutions, Arizona courts have discussed the constitutional issues as if only one constitution were involved. See, e.g. State v. Book-Cellar, Inc., 679 P.2d 548 (Ariz.App. 1984) All of these cases rely on precedent which interprets the federal Constitution. Even in the instant case, the Arizona Court of Appeals is interpreting the federal Constitution, then ruling that the state constitution provides the same protection. (See State v. Feld, attached in appendix at A-34).

Additionally, there is no evidence that the framers of the Arizona Constitution intended Article 2, Section 6 to provide more protection to speech and the press than the federal Constitution. Because the Arizona Constitution was enacted before this

Court incorporated Bill of Rights protections into the 14th Amendment and made them applicable to the states,[14] the framers of the Arizona Constitution likely intended to protect speech and press from state legislative intrusion in a manner similar to the federal Constitution's protection from Congressional intrusion.

The only evidence of a difference works against the Respondents, and that is the actual words of Article 2, Section 6. Instead of the broad language of the federal Constitution, the Arizona Constitution's protection appears narrower. It states that "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right. Az. Const., article 2, sec.

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[14] Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).

6. The framers of the Arizona Constitution added a clause to warn that abusers of freedom of speech and press would be punished. It is reasonable to conclude that the Arizona framers intended to provide less protection to expression than the federal Constitution. Certainly the sale of illegal, obscene material constitutes an abuse of the right to freedom of speech and press, and the use of RICO in obscenity cases is an attempt to make the abusers responsible.

The framers of the Arizona Constitution intended, and the courts of Arizona have held, that Article 2, Section 6 of the Arizona Constitution provides freedom of expression at best coterminously with the federal Constitution. If indeed the Arizona Constitution provides less protection

than the First Amendment, this Court's reversal of the Arizona Court of Appeals on federal constitutional grounds will lead *a fortiori* to reversal by the Arizona Supreme Court on state constitutional grounds. Because the Arizona Court of Appeals' ruling is based on an erroneous reading of the federal Constitution, it should be overturned.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court issue a writ of certiorari to the Arizona Court of Appeals.

Respectfully submitted,

Benjamin W. Bull
Attorney for Petitioner

APPENDIX

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THE CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARIZONA CONSTITUTION

ARTICLE II

Section 6. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

ARIZONA REVISED STATUTES

Criminal Code

Title 13

Chapter 23.--Organized Crime and Fraud

§13-2301. Definitions

* * *

D. For the purposes of §§ 13-2312 through 13-2315, unless the context otherwise requires:

1. "Control", in relation to an enterprise, means the possession of sufficient means to permit substantial direction over the affairs of an enterprise and, in relation to property, means to acquire or possess.

2. "Enterprise" means any corporation, partnership, association, labor union, or other legal entity or any group of persons associated in fact although not a legal entity.

3. "Financial institution" means any bank, trust company, savings and loan association, credit union, small money

lender under the jurisdiction of the state banking department or an agency of the United States or any business under the jurisdiction of the securities division of the corporation commission, the real estate department or the department of insurance.

4. "Racketeering" means any act, including any preparatory or completed offense, committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving:

(a) Homicide.

(b) Robbery.

(c) Kidnapping.

(d) Forgery.

(e) Theft.

(f) Bribery.

(g) Gambling.

(h) Usury.

(i) Extortion.

(j) Extortionate extension of credit.

(k) Prohibited drugs, marijuana or other prohibited chemicals or substances.

(l) Trafficking in explosives, weapons or stolen property.

(m) Leading organized crime.

(n) Obstructing or hindering criminal investigations or prosecutions.

(o) Asserting false claims including, but not limited to, false claims asserted through fraud or arson.

(p) False statements or publications concerning land for sale or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands.

(q) Resale of realty with intent to defraud.

(r) Fraud in the purchase or sale of securities.

(s) Sale of unregistered securities or real property securities and transactions involving such securities by unregistered dealers or salesmen.

(t) A scheme or artifice to defraud.

(u) Obscenity.

(v) Child pornography.

(w) Prostitution.

(x) Restraint of trade or commerce in violation of § 34-252.

(y) Terrorism.

(z) Money laundering.

5. "Records" means any book, paper, writing, record, computer program or other material.

* * *

§ 13-2312. Illegal control of an enterprise; illegally conducting an enterprise; classification

A. A person commits illegal control of an enterprise if such person, through racketeering or its proceeds, acquires or maintains, by investment or otherwise, control of any enterprise.

B. A person commits illegally conducting an enterprise if such person is employed or associated with any enterprise and conducts or participates in the conduct of such enterprise's affairs through racketeering.

C. A knowing violation of this section is a class 3 felony.

§ 13-2313. Judicial powers over racketeering criminal cases

During the pendency of any criminal case charging an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, the superior court may, in addition to its other powers, issue an order pursuant to § 13-2314, subsections B and C. Upon conviction of a person

for an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, the superior court may, in addition to its other powers of disposition, issue an order pursuant to § 13-2314.

§ 13-2314. Racketeering; civil remedies; definitions

A. A person who sustains injury to his person, business or property by racketeering as defined by § 13-2301, subsection D, paragraph 4 or by a violation of § 13-2312 may file an action in superior court for the recovery of treble damages and the costs of the suit, including reasonable attorney's fees. The state may file an action in behalf of those persons injured or to prevent, restrain, or remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312.

B. The superior court has jurisdiction to prevent, restrain, and remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders.

C. Prior to a determination of liability such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, the creation of receiverships and the enforcement of constructive trusts, in connection with any property or other interest subject to damages, forfeiture or other remedies or restraints pursuant to this section as the court deems proper.

D. Following a determination of liability such orders may include, but are not limited to:

1. Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

2. Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of this state, to the extent the constitutions of the United States and this state permit.

3. Ordering dissolution or reorganization of any enterprise.

4. Ordering the payment of treble damages to those persons injured by racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312.

5. Ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering, in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, civil and criminal, including reasonable attorney fees, to be paid to the general fund of the state or county which brings the action.

6. Forfeiture to the general fund of the state or county as appropriate to the extent not already ordered to be paid in other damages:

(a) Any property or other interest acquired or maintained by a person in violation of § 13-2312.

(b) Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise or other property which a person has acquired or

maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.

(c) All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities, property and other things of value used or intended to be used to facilitate commission of the offense.

7. Payment to the general fund of the state or county as appropriate of an amount equal to the gain that was acquired or maintained through an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4, or a violation of § 13-2312 or that any person is liable for under this section.

E. A person or enterprise that acquires any property through an offense included in the definition of

racketeering in § 13-2301, subsection D, paragraph 4 or through a violation of § 13-2312 is an involuntary trustee. The involuntary trustee and any other person or enterprise, except a bona fide purchaser for value reasonably without notice of the unlawful conduct and who is not knowingly taking part in an illegal transaction, holds the property, its proceeds and its fruits in constructive trust for the benefit of persons entitled to remedies under this section.

F. In addition to or in lieu of an action under this section the state may file an action pursuant to chapter 39 of this title for forfeiture, to the extent not already ordered paid pursuant to this section, of:

1. Any interest acquired or maintained by a person in violation of § 13-2312.

2. Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise or other property which a person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.

3. All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities, property and other things of value used or intended to be used to facilitate the commission of the offense.

G. A defendant convicted in any criminal proceeding shall be precluded from subsequently denying the essential allegations of the criminal offense of which he was convicted in any civil proceeding. For the purposes of this

subsection, a conviction may result from a verdict or plea including a no contest plea.

H. Notwithstanding any law creating a lesser period, the initiation of civil proceedings related to violations of any offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, including procedures pursuant to chapter 39 of this title,[1] shall be commenced within seven years after actual discovery of the violation.

I. This state may, in any civil action brought pursuant to this section, file with the clerk of the superior court a certificate stating that the case is of special public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or presiding chief judge of the superior court in the county in which such action is pending and, upon

receipt of such copy, the judge shall immediately designate a judge to hear and determine the action. The judge so designated shall promptly assign such action for hearing, participate in the hearings and determination and cause the action to be expedited.

J. The standard of proof in actions brought pursuant to this section is the preponderance of the evidence test.

K. A person other than the attorney general or county attorney who files an action under this section shall serve notice and one copy of the pleading on the attorney general within thirty days after the action is filed with the superior court. The notice shall identify the action, the person and the person's attorney. Service of the notice does not limit or otherwise affect the right of the state to maintain an action under this section or intervene in a pending action nor does

it authorize the person to name the state of the attorney general as a party to the action.

L. Except in cases filed by a county attorney, the attorney general may, upon timely application, intervene in any civil action or proceeding brought under this section if the attorney general certifies that in his opinion the action is of special public importance. Upon intervention, the attorney general may assert any available claim and is entitled to the same relief as if the attorney general had instituted a separate action.

M. In addition to the state's right to intervene as a party in any action under this section, the attorney general may appear as amicus curiae in any proceeding in which a claim under this section has been asserted or in which a court is interpreting § 13-2301,

13-2312, 13-2313, 13-2314.01, 13-2314.02, 13-2315 or this section.

N. A civil action under this section is remedial and not punitive and does not limit and is not limited by any other previous or subsequent civil or criminal action under this title or any other provision of law. Civil remedies provided under this title are supplemental and not mutually exclusive.

O. In this section and § 13-2312:

1. "Acquire" means for a person to do any of the following:

(a) Possess.

(b) Act so as to exclude other persons from using their property except on his own terms.

(c) Bring about or receive the transfer of any interest in property, whether to himself or to another person, or to secure performance of a service.

2. "Gain" means any benefit, interest or property of any kind without

reduction for expenses of acquiring or maintaining it or incurred for any other reason.

3. "Proceeds" includes any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of this interest, in whatever form.

[1]Section 13-4301 et seq.

* * *

§ 13-2314.02. Racketeering lien; content; filing; notice effect

A. The state, upon filing a civil action under § 13-2314, upon seizure for forfeiture under chapter 39 of this title or upon charging an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, may file in accordance with this section a racketeering lien. A filing fee or

other charge is not required for filing a racketeering lien.

B. A racketeering lien shall be signed by the attorney general or the county attorney representing the state in the action and shall set forth the following information:

1. The name of the defendant whose property or other interests are to be subject to the lien.

2. In the discretion of the attorney general or county attorney filing the lien, any aliases or fictitious names of the defendant named in the lien.

3. If known to the attorney general or county attorney filing the lien, the present residence or principal place of business of the person named in the lien.

4. A reference to the proceeding pursuant to which the lien is filed, including the name of the court, the

title of the action and the court's file number for the proceeding, if any.

5. The name and address of the attorney representing the state in the proceeding pursuant to which the lien is filed.

6. A statement that the notice is being filed pursuant to this section.

7. The amount which the state claims in the action or, with respect to property or other interests which the state has requested forfeiture to the state or county, a description of the property or interests sought to be paid or forfeited.

8. If known to the attorney general or county attorney filing the lien, a description of property which is subject to forfeiture to the state or property in which the defendant has an interest which is available to satisfy a judgment entered in favor of the state.

9. Such other information as the attorney general or county attorney filing the lien deem appropriate.

C. The attorney general or the county attorney filing the lien may amend a lien filed under this section at any time by filing an amended racketeering lien in accordance with this section which identifies the prior lien amended.

D. The attorney general or the county attorney filing the lien shall, as soon as practical after filing a racketeering lien, furnish to any person named in the lien a notice of the filing of the lien. Failure to furnish notice under this subsection does not invalidate or otherwise affect a racketeering lien filed in accordance with this section.

E. A racketeering lien is perfected against interests in personal property by filing the lien with the secretary of state, except that in the case of titled motor vehicles it shall be filed with

the motor vehicle division. A racketeering lien is perfected against interests in real property by filing the lien with the county recorder of the county in which the real property is located. The state may give such additional notice of the lien as it deems appropriate.

F. The filing of a racketeering lien in accordance with this section creates a lien in favor of the state in:

1. Any interest of the defendant, in real property situated in the county in which the lien is filed, then maintained or thereafter acquired in the name of the defendant identified in the lien;

2. Any interest of the defendant, in personal property situated in this state, then maintained or thereafter acquired in the name of the defendant identified in the lien; and

3. Any property identified in the lien to the extent of the defendant's interest therein.

G. The filing of a racketeering lien under this section is notice to all persons dealing with the person or property identified in the lien of the state's claim. The lien created in favor of the state in accordance with this section is superior and prior to the claims or interest of any other person, except a person possessing:

1. A valid lien perfected prior to the filing of the racketeering lien.

2. In the case of real property, an interest acquired and recorded prior to the filing of the racketeering lien.

3. In the case of personal property, an interest acquired prior to the filing of the racketeering lien.

H. Upon entry of judgment in favor of the state, the state may proceed to execute thereon as in the case of any

other judgment, except that in order to preserve the state's lien priority as provided in this section the state shall, in addition to such other notice as is required by law, give at least thirty days' notice of such execution to any person possessing at the time such notice is given an interest recorded subsequent to the date the state's lien was perfected.

I. This section shall not limit the right of the state to obtain any order or injunction, receivership, writ, attachment, garnishment or other remedy authorized under § 13-2314 or appropriate to protect the interests of the state or available under other applicable law including, without limitation, title 44, chapter 8, article 1[1] and chapter 39 of this title.[2]

[1]Section 44-1001 et seq.

[2]Section 13-4301 et seq.

* * *

ARIZONA REVISED STATUTES

Criminal Code

Title 13

Chapter 35.--Obscenity

§ 13-3501. Definitions

In this chapter, unless the context otherwise requires:

* * *

2. "Item" means any material or performance which depicts or describes sexual activity and includes any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty device, recording, transcription, live or recorded telephone message or other similar items whether tangible or intangible and including any performance, exhibition, transmission or dissemination of any of the above. An item also includes a live performance or exhibition which depicts sexual activity

to the public or an audience of one or more persons. An item is obscene within the meaning of this chapter when all of the following apply:

(a) The average person, applying contemporary state standards, would find that the item, taken as a whole, appeals to the prurient interest. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.

(b) The average person, applying contemporary state standards, would find that the item depicts or describes, in a patently offensive way, sexual activity as that term is described in this section.

(c) The item, taken as a whole, lacks serious literary, artistic, political or scientific value.

3. "Knowledge of the character" means having general knowledge or awareness, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of that which is reasonably susceptible to examination by the defendant both:

(a) That the item contains, depicts, or describes nudity, sexual activity, sexual conduct, sexual excitement or sadomasochistic abuse, whichever is applicable, whether or not there is actual knowledge of the specific contents thereof. This knowledge can be proven by direct or circumstantial evidence, or both.

(b) If relevant to a prosecution for violating § 13-3506 or 13-3507, the age of the minor, provided that an honest mistake shall constitute an excuse from

liability under this chapter if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

4. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

5. "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed, for the purpose or in the context of sexual gratification or abuse.

6. "Sexual activity" means:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

7. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.

8. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

9. "Ultimate sexual acts" means sexual intercourse, vaginal or anal, fellatio, cunnilingus, bestiality or sodomy. A sexual act is simulated when

it depicts explicit sexual activity which gives the appearance of consummation of ultimate sexual acts.

§ 13-3502. Production, publication, sale, possession and presentation of obscene items; classification

A person is guilty of a class 5 felony who, with knowledge of the character of the item involved, knowingly:

1. Prints, copies, manufactures, prepares, produces, or reproduces any obscene item for purposes of sale or commercial distribution.

2. Publishes, sells, rents, lends, transports or transmits in intrastate commerce, imports, sends or causes to be sent into this state for sale or commercial distribution or commercially distributes or exhibits any obscene item, or offers to do any such things.

3. Has in his possession with intent to sell, rent, lend, transport, or commercially distribute any obscene item.

4. Presents or participates in presenting the live, recorded or exhibited performance of any obscene item to the public or an audience for consideration or commercial purpose.

* * *

Division 1
Court of Appeals
State of Arizona
Filed Aug. 4 1987
Glen D. Clark, Clerk
By /S/

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellant, v. STEVEN FELD, LARRY CHABLER, Appellees.	1 CA-CR 9471 Department C OPINION

Appeal from the Superior Court of
Maricopa County

Cause CR-148389

The Honorable Alan S. Kamin, Judge

REVERSED AND REMANDED

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C O R C O R A N, Judge

Defendants Steven Feld and Larry Chabler were charged by Count I of the criminal indictment with conducting an illegal enterprise through racketeering. The other three counts of the indictment alleged the exhibition of obscene films by various combinations of the individual defendants and a corporate defendant, C.A.T., Inc., dba Erotica Motel. Defendants Feld and Chabler moved to dismiss Count I and the trial court granted the motion and the state appealed. See A.R.S. § 13-4032(1); Litak v. Scott, 138 Ariz. 599, 676 P.2d 631 (1984). C.A.T., Inc. is not a party to this appeal. Defendants moved to delay trial of the other counts pending

resolution of this appeal. The motion was granted. We vacate the order of dismissal and reinstate Count I.

The trial court explained its reasoning for granting the motion to dismiss, which we summarize as follows:

1. The pre-conviction remedies of A.R.S. § 13-2314(C) constitute impermissible prior restraints on protected expression when employed in RICO/obscenity prosecutions.

2. Similarly, the post-conviction remedies of § 13-2314(D) are generally inappropriate for application in obscenity cases.

3. To try to interpret § 13-2314(B), (C) and (D) in such a way as to render them constitutional would require a tortuous interpretation which would not reflect the legislature's intent.

4. The civil burden of proof made applicable by § 13-2314(F) further complicates the constitutional problems of the remedies.

5. Once the civil remedies of § 13-2314 have been made inapplicable to obscenity prosecutions, to allow the use of obscenity as a predicate offense for racketeering makes no sense, because the only remaining effect is to convert conduct that is a class 6 felony under A.R.S. § 13-3502 into a class 3 felony under § 13-2312,

which cannot be the legislative intent in making obscenity a predicate offense under the RICO statutes.

The issue presented is whether the trial court erred by finding that the Arizona organized crime and fraud statutes (RICO), A.R.S. §§ 13-2301, et seq., are unconstitutional as applied to obscenity proceedings, and by granting defendants' motion to dismiss Count I. RICO is an acronym for the federal Racketeer Influenced and Corrupt Organizations statutes, 18 U.S.C. §§ 1961, et seq., upon which the Arizona racketeering statutes are based. See A.R.S. §§ 13-2312 to -2315, Historical Notes; Baines v. Superior Court, 142 Ariz. 145, 148, 688 P.2d 1037, 1040 (App. 1984),

Under RICO,

> ["r]acketeering" means any act, including any preparatory or completed offense, committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred ...

> and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving: ... [o]bscenity.

A.R.S. § 13-2301(D)(4). A.R.S. § 13-3501(2) defines an item as obscene when: (a) the "average person, applying contemporary state standards, would find that the item, taken as a whole, appeals to the prurient interest; ... (b) [such person] would find that the item depicts or describes, in a patently offensive way, sexual activity; ... [and] (c) [t]he item, taken as a whole, lacks serious literary, artistic, political or scientific value."[1]

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[1]The United States Supreme Court's opinion in Pope v. Illinois, ___ U.S. ___, 107 S.Ct. 1918, ___ L.Ed.2d ___ (1987), does not affect our statute. In Pope, the court reaffirmed the tripartite test for judging whether material is obscene, as articulated in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The court noted that Smith v. United States, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977), held that

The state argues that the remedies set forth in A.R.S. § 13-2314 are constitutional on their face, and if not, must be interpreted in such a way as to be constitutional, if possible. The state also urges that even if some remedies are unconstitutional, the trial court was not justified in finding that

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FOOTNOTE 1 CONTINUED...

> [T]he first and second prongs of the Miller test--appeal to prurient interest and patent offensiveness--are issues of fact for the jury to determine applying contemporary community standards.
>
> ....
>
> [As to Miller's third prong], [t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

___U.S. at ___, 107 S.Ct. at 1920-21, ___ L.Ed.2d at ___. Thus, the third prong of A.R.S. § 13-3501(2) must be analyzed according to this reasonable person standard, which is entirely consistent with the language in our statute.

obscenity could not be used as a predicate offense under the RICO statutes. Defendants urge that the majority of the prejudgment and post-judgment RICO remedies are unconstitutional as applied to obscenity, and that it makes little sense for the court to try to save any of the provisions once the unconstitutional portions thereof are excised. Defendants also argue that the crime of illegally conducting an enterprise through obscenity is unconstitutionally vague.

We need not here recount the long history of the law dealing with obscenity. See State ex rel. Collins v. Superior Court [Scott], No. 17962-SA (Ariz. Sup.Ct. July 2, 1986). In general, publications are presumed to be protected from governmental interference pursuant to the first amendment of the United States Constitution. Roaden v.

Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973). Obscenity is not within the area of constitutionally protected speech or press and may therefore be regulated by the State. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); State v. Book-Cellar, Inc., 139 Ariz. 525, 679 P.2d 548 (App. 1984). However, "[w]hile obscenity is not constitutionally protected, the procedure by which we determine what is obscene, unprotected speech directly implicates the first amendment because the threat of criminal prosecution chills freedom of expression." State ex rel. Collins v. Superior Court [Scott], slip op. at 18 (dissent). The line between protected and unprotected speech is finely drawn and requires the use of sensitive tools to discern and enforce the boundary. E.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d

125 (1975). The legislature, by making obscenity a predicate offense under the racketeering statute, has called into question the constitutionality of some portions of RICO when applied to obscenity because the remedies which are appropriate to other RICO criminal offenses are unconstitutionally overbroad in the obscenity area when applied to protected speech as opposed to unprotected obscenity.

Nevertheless, courts strive to save statutes which may be interpreted to be constitutional. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); State ex rel. Kidwell v. U.S. Mktg., Inc., 102 Idaho 451, 631 P.2d 622 (1981), appeal dismissed, 455 U.S. 1009, 102 S.Ct. 1649, 71 L.Ed.2d 878 (1982). Thus, in interpreting Arizona statutes dealing with obscenity this court has, when possible, given the questioned statute a

constitutional construction. Book-Cellar, 139 Ariz. at 528, 679 P.2d at 551. Our duty is to uphold statutes, even if they are not artfully drawn. Id. By adding obscenity as a predicate offense in § 13-2301, the legislature manifested an intent that where obscenity is connected to racketeering, it needs to be dealt with in the racketeering statutes, rather than solely through the obscenity statutes, A.R.S. §§ 13-3501, et seq., or nuisance statutes, A.R.S. §§ 12-811, et seq. We therefore strive to interpret the questioned statutes to effect that intent, to the extent that is constitutionally permissible.

1. Standing

Initially, we must determine whether defendants have standing to challenge the constitutionality of RICO as applied to obscenity charges.

The state asserts that it will not attempt to seize items or close businesses before trial, but will only request orders necessary to maintain the status quo. Thus, it might be argued that defendants have no standing to contest what the state might do. Although the state in its original brief "submits it would be a waste of judicial economy to decide this case on the basis that the trial court's ruling was premature," and that "the state agrees that the trial court's ruling was premature," and that "the state agrees that the trial court's ruling should be considered on appeal in its entirety," in its supplemental brief, the state argues that defendants cannot challenge the facial validity of the statute because defendants' activities are clearly obscene. We disagree.

First, even if the items for which defendants are prosecuted are clearly

obscene, we must presume that the other activities of defendants are protected activity. The possible chilling effect of the RICO remedies on presumptively protected activities and the fact that defendants are being prosecuted and could be subject to any of the remedies set forth in § 13-2314 entitles them to contest the constitutionality of § 13-2314 and requires the court to do a facial analysis of the statute before prosecution proceeds. Polykoff v. Collins, 816 F.2d 1326 (9th Cir. 1987); J-R Dist., Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984), rev'd on other grounds sub nom. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). See also State v. Tocco, 1 CA-CR 7480, slip op. at 4 (Ariz. App. Dec. 2, 1986), review pending in CR-87-0032-PR (April 7, 1987); Western Business Sys., Inc. v. Slaton, 492 F.Supp. 513 (N.D. Ga. 1980).

As stated in the dissent in State v. Superior Court, slip op. at 21: "The threat of unbridled and unhindered criminal prosecution is bound to have a chilling effect upon publishers, libraries, motion picture exhibitors and the like." Moreover, our consideration of § 13-2314 indicates grave constitutional problems which would plague RICO obscenity prosecutions and affect protected activities without judicial guidance as to what constitutional limits must be placed on such prosecutions.

2. Vagueness

Section 13-2312(B), under which defendants were charged, provides:

> A person commits illegally conducting an enterprise if such person is employed or associated with any enterprise and conducts or participates in the conduct of such enterprise's affairs through racketeering [i.e., obscenity].

Section 13-2312(C) makes that act a class 3 felony. We reject defendants' argument that illegally conducting an

enterprise through obscenity is an unconstitutionally vague offense. The basic test for determining whether a statute is unconstitutionally vague is whether the offense is defined in terms that people of average intelligence can understand, since no one may be required, at the risk of his liberty, to speculate as to the meaning of a penal statute. State v. Serrano, 145 Ariz. 498, 702 P.2d 1343 (App. 1985).

In Tocco, the defendant argued that the crime of leading organized crime, as set forth in A.R.S. § 13-2308, was unconstitutionally vague. This court held that

> A commonsense reading of the statute demonstrates a legislative intent to punish only those individuals who cooperate with a combination of individuals or businesses with the intent to assist them in violating Arizona's felony statutes on a continuing basis. The statute does not reach any constitutionally protected conduct and its proscriptions are easily understood by persons of ordinary intelligence.

Slip op. at 9. The court concluded that the crime of leading organized crime was not unconstitutionally vague. Slip op. at 13.

In Baines v. Superior Court, 142 Ariz. 145, 688 P.2d 1037 (App. 1984), Division Two of this court stated that the essential elements of illegally conducting an enterprise are:

> (1) defendant was employed by or associated with the enterprise;
>
> (2) that he conducted or participated in the conduct of the affairs of the enterprise;
>
> (3) that he conducted or participated in the conduct of the affairs of the enterprise through racketeering (i.e., through the commission of at least one predicate offense).

142 Ariz. at 149, 688 P.2d at 1041. Here the predicate offense of obscenity is referable to the Arizona obscenity statutes, A.R.S. §§ 13-3501, et seq. The definition of racketeering requires that the crime be for financial gain and punishable by imprisonment for more than

one year. A.R.S. § 13-2301(D)(4). Further, § 13-2312(C) requires a knowing violation. The scienter requirement increases the notice to defendant that his conduct is prohibited and prevents arbitrary and discriminatory enforcement. Tocco, slip op. at 13. Thus, we find that § 13-2312(B) is not void for vagueness.

In Tocco, this court distinguished Ohio's organized crime statute which was struck down in State v. Young, 62 Ohio St.2d 370, 406 N.E.2d 499, cert. denied, 499 U.S. 905, 101 S.Ct. 281, 66 L.Ed.2d 137 (1980). Defendants have extensively cited Young in support of their vagueness argument. The Arizona statutes do not suffer from the deficiency of the Ohio statute because they do not punish a person who pursues legal activities. Tocco, slip op. at 8. Section 13-2312(B) makes conduct through an enterprise illegal only if it is

"through racketeering." Thus a defendant is criminally liable in a RICO obscenity prosecution only if he has committed an underlying felony obscenity crime.

3. RICO Applied in Obscenity Cases

A more difficult question is presented by the application of the RICO remedies in criminal obscenity prosecutions. The only opinion directly considering the constitutionality of applying RICO remedies in obscenity prosecutions is 4447 Corp. v. Goldsmith, 479 N.E.2d 578 (Ind. App. 1985), vacated, 504 N.E.2d 559 (Ind. 1987).[2] While the Indiana

[2] In Western Business Sys., Inc. v. Slaton, 492 F.Supp. 513, 514 (N.D. Ga. 1980), plaintiffs asked the trial court to enjoin possible prospective prosecutions using obscenity as a predicate offense for RICO violations. They argued that forfeiture of property acquired with racketeering proceeds acted as a prior restraint on presumptively protected materials. The court held that there was no First Amendment problem because the defendants were not entitled to retain racketeering

Supreme Court vacated the intermediate appellate court's opinion in 4447 Corp., we discuss the court of appeals' decision because we find it more comprehensive and persuasive than the Indiana Supreme Court's reversal of that decision.

Indiana Code Ann. § 34-4-30.5-2 & -3 provides that after the trial court finds by a preponderance of the evidence that a RICO violation has occurred, it may: (1) order divestiture of a defendant's interest in the business; (2) prohibit defendant from future activities or investments; (3) order dissolution or reorganization of the enterprise; (4) suspend or revoke

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FOOTNOTE 2 CONTINUED...
proceeds, nor were they entitled to property acquired by racketeering proceeds, even if that property consisted of books. The court ruled that denial of the injunction was proper because there was no irreparable harm or likelihood of success on the merits of plaintiffs' claim.

licenses, permits, or corporate charters; (5) order forfeiture of property; or (6) make any other order deemed appropriate. The trial court in 4447 Corp. ordered the padlocking of a bookstore which had not yet opened, and later ordered that the prosecution could padlock three operating bookstores and seize their contents. The police proceeded to seize and cart away the entire contents of the three bookstores.

In 4447 Corp., the intermediate appellate court invalidated the statutes as applied to obscenity on these grounds: (1) as an impermissible prior restraint; (2) for failure to comply with procedural safeguards; and (3) for failure to employ means that are less restrictive of free expression for regulation of materials presumptively protected by the First Amendment, 479 N.E.2d at 585. That court, however, primarily relied on the theory that the

statutes were facially invalid as applied to obscenity because they constituted impermissible prior restraints on protected speech and press. Id. A clearly impermissible prior restraint was found because the state had padlocked stores and seized books, magazines, films, and other store property, only a small part of which had been alleged to be obscene. Id. at 586. The court was especially concerned that the state's pre-conviction actions had effectively prevented the circulation of presumptively protected materials.

The court also was concerned with the potential post-conviction remedy of forfeiture of defendants' real and personal property, including their inventory. The forfeiture remedy extended to presumptively protected materials, and was thus overbroad and facially invalid as a prior restraint. The court rejected the argument that the

forfeiture sanctions were not prior restraints, but were merely punishment for criminal offenses, and concluded that forfeiture of licenses or charters were impermissible prior restraints, and noted that the RICO statutes:

> may indeed curb the availability of obscenity but cuts a broad swath into the realm of protected expression as well. The consequent overbreadth of these measures with their attendant chilling effect on the exercise of First Amendment rights renders the entire scheme constitutionally invalid. We therefore hold that the injunctive remedies of IC 34-4-30.5-2, and the seizure and forfeiture sanctions of IC 34-30.5-3.4, constitute facially unconstitutional prior restraints in their application to the predicate offense of obscenity.

479 N.E.2d at 592.

The Indiana Supreme Court vacated the court of appeals' decision and held that the Indiana RICO statutes as they pertain to the predicate offense of obscenity do not violate the First and Fourteenth Amendments to the United States Constitution. The court decided

that the RICO remedies were instituted in an attempt to compel the forfeiture of the proceeds of alleged racketeering activity and not to restrain the future distribution of expressive materials.

We believe the court of appeals' decision and the dissent in the Indiana Supreme Court are better reasoned than the majority opinion from the supreme court. The dissenter stated his "agreement with the thoughtful and thorough opinion" of the court of appeals. Nevertheless, we disagree with the all-or-nothing results of both opinions, invalidating the entire statute or validating it in its entirety, as will be shown below. In interpreting Arizona statutes dealing with obscenity, this court has, when possible, given the questioned statute a constitutional construction. Book-Cellar.

4. Pre-Judgment Remedies

With the Indiana courts' opinions in mind, we examine the Arizona statutes. A.R.S § 13-2313 provides that during the pendency of a RICO criminal proceeding pursuant to § 13-2312 the superior court may issue an order pursuant to § 13-2314(B)-(C) which provides:

> B. The superior court has jurisdiction to prevent, restrain, and remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders.
>
> C. Prior to a determination of liability such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, the creation of receiverships and the enforcement of constructive trusts, in connection with any property or other interest subject to damages, forfeiture or other remedies or restraints pursuant to this section as the court deems proper.

The state argues that the statutory pre-conviction remedies "do not provide penalties prior to conviction, but

rather only permit a court to preserve the status quo during the pendency of the proceedings." Defendants urge that the statutory scheme for pre-conviction remedies is unconstitutional because it restricts constitutionally protected activities and materials.

Section 13-2314(B) merely gives the court jurisdiction to prevent, restrain, or remedy racketeering by issuing appropriate orders, after consideration for the rights of all innocent persons affected by such violation and after a hearing or trial. We find no problem with this very general provision. Injunctions or restraining orders must comply with rule 65(h), Arizona Rules of Civil Procedure. Book-Cellar. Moreover, all orders under § 13-2314(B) would be subject to the limitations stated hereinafter.

Next, we consider the statutory pre-conviction remedies set forth in

§ 13-2314(C). That section sets forth permissible orders, including, but not limited to, restraining orders or prohibitions, including the acceptance of performance bonds for property subject to damages or forfeiture. The state argues that the purpose of § 13-231(B) is merely to preserve the status quo. One primary and legitimate purpose of a predetermination order would be to ensure that a copy of an allegedly obscene book or movie is available as evidence. Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973); City of Phoenix v. Ellwest Stereo Theatre, 21 Ariz. App. 611, 522 P.2d 567 (1974). Also, the court could take measures to ensure that a defendant would not conceal or dispose of the profits made from the sale of obscene items which would properly be subject to post-conviction seizure. While the court could restrain a defen-

dant from moving inventory in its entirety, it could not interfere with continued exhibitions or sales. Book-Cellar. Any order requiring action such as forfeiting any property of the business, forfeiting a defendant's interest therein, or closing the business, prior to determination of liability, would be an impermissible prior restraint. Moreover, a preliminary order may not do what a post-conviction order may not do, as we shall discuss. Given these limitations, § 13-2314(C) is constitutional.

5. Post-Judgment Remedies

We turn now to the post-conviction remedies listed under § 13-2314(D), which states:

> D. Following a determination of liability such orders may include, but are not limited to:
>
> 1. Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

2. Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of this state, to the extent the constitutions of the United States and this state permit.

3. Ordering dissolution or reorganization of any enterprise.

4. Ordering the payment of treble damages to those persons injured by racketeering as defined in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312.

5. Ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, civil and criminal, including reasonable attorney fees, to be paid to the general fund of the state or county which brings the action.

6. Forfeiture to the general fund of the state or county as appropriate to the extent not already ordered to be paid in other damages:

(a) Any property or other interest acquired or maintained by a person in violation of § 13-2312.

(b) Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of

influence over any enterprise or other property which a person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.

(c) All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities, property and other things of value used or intended to be used to facilitate commission of the offense.

7. Payment to the general fund of the state or county as appropriate of an amount equal to the gain that was acquired or maintained through an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 or that any person is liable for under this section.

The state argues that any order pursuant to § 13-2314(D) is permissible because the defendants have been found guilty of the crime of obscenity and may be punished accordingly.

Subsections (D)(1), (2) and (3) are virtually identical to the Indiana statutory provisions held valid by the Indiana Supreme Court in 4447 Corp. We

agree with the reasoning of the Indiana Court of Appeals in 4447 Corp., 479 N.E.2d 578 (Ind. App. 1985), and with the dissent in 4447 Corp., 504 N.E.2d 559 (Ind. 1987), that these sanctions act as a prior restraint upon the sale of privileged matter, and that the effect of the restraint is to close bookstores and theatres. The sanctions restrict future, presumptively protected speech, rather than punishing the distribution of unprotected speech in the past. 479 N.E.2d at 591 (Ind. App.). To cite an example posed by defendants, under subsection (D)(1), the owners of bookstores which are not known as "adult" or sexually-oriented book-stores could be ordered to divest themselves of any interest in their stores if one store sold a magazine which is adjudged obscene. See Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980).

Alternatively, under subsection (D)(3), the court could dissolve or reorganize the business. Without question, such action would constitute an impermissible prior restraint on protected activities.

Subsection (D)(4) is not applicable to this criminal action because there is no injured person. It apparently creates a private cause of action or right to restitution with treble damages for persons injured through obscenity. State v. Henderson, 149 Ariz. 254, 717 P.2d 933 (App. 1986). An award thereunder would not appear to constitute an impermissible prior restraint, any more than would a fine imposed on the defendant, a remedy which has been held not to constitute a prior restraint in Polykoff v. Collins, 596 F.Supp. 584 (D. Ariz. 1984), aff'd, 816 F.2d 1326 (9th Cir. 1987).

Similarly, subsection (D)(5), allowing a state or county general fund to be

reimbursed for the cost of prosecuting a defendant, is not facially invalid because it does not single out protected interests, but rather applies in all RICO criminal actions and is in the nature of a fine. Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed. 2d 295 (1983); Polykoff. Selling obscene matter is a crime, and the defendants can reasonably be required to reimburse the state or county for costs of prosecution.

The remedy in subsection (D)(6)--forfeiture of interests or proceeds--is proper to the extent that the obscene materials themselves, or proceeds from materials determined to be obscene, may be seized. State v. A Motion Picture Entitled "The Bet", 219 Kan. 64, 547 P.2d 760 (1976); United States v. Zang, 703 F.2d 1186 (10th Cir. 1982). Also, as held in Western Business Systems,

items of the enterprise could be forfeited if they were gains from other racketeering activity. Racketeering proceeds cannot be laundered merely by being invested in bookstores. 4447 Corp., 504 N.E.2d 559 (Ind. 1987).

On the other hand, profits from the sales of protected materials--ie., items not adjudged obscene--could not be seized. J-R Distributors, 725 F.2d at 494, rev'd on other grounds sub nom., Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). Also, an order could not forbid the sale of items not yet determined to be obscene. Universal Amusement Co., Inc. v. Vance, 587 F.2d 159 (5th Cir. 1978), aff'd, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980). Moreover, the court could not order the seizure of bookshelves, cash registers, or similar items. Book-Cellar, 139 Ariz. at 533, 679 P.2d at 556.

Subsection (D)(7), allowing payment to a general fund of an amount equal to the "gain" acquired through the obscenity offense, is constitutional for the reasons just stated. The provisions for forfeiture under A.R.S § 13-2314(F) are similarly limited as stated above. We note that § 13-2314 (F)(3) is unconstitutional to any extent that it purports to allow seizure of property used to facilitate an offense where that property is not itself contraband, or traceable to racketeering proceeds. United States v. Zang; Book-Cellar.

The last question facing us is whether, having found some of the RICO remedies unconstitutional as applied to obscenity proceedings, we must declare the entire RICO scheme unconstitutional if applied to obscenity prosecutions. Defendants argue that to leave obscenity as a predicate offense without leaving all of the RICO remedies intact

frustrates legislative intent. They argue that the only effect of the partial validation is to elevate a class 6 felony under § 13-3502[3] to a class 3 felony under § 13-2312(C). They submit that the eviscerated version of the statute as applied to obscenity would add nothing to the prosecutorial tools now offered by Arizona obscenity statutes and the provisions of the criminal code. The trial court adopted this reasoning. We disagree.

First, we have not found all the § 13-2314 remedies unconstitutional as applied to obscenity cases. The legislature desired to reach obscenity through the RICO statutes to the extent constitutionally allowed. Where an obscenity statute is in part constitutional and in part unconstitutional,

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[3]A.R.S. § 13-3502 has recently been amended so that a violation is a class 5 felony. Laws 1986, ch. 411, § 2.

if the parts may stand independently of one another, that which is constitutional may stand, while that which is unconstitutional will be rejected. Spokane Arcade.

Second, the legislature, by making obscenity a predicate offense for RICO, and thus punishable as a class 3 felony under § 13-2312, has created a different crime than that set forth in § 13-3502. As noted herein, there are several elements to the crime of illegally conducting an enterprise through obscenity. Commission of the obscenity offense itself is only one element of that crime. Racketeering organizations can operate through the sale of obscenity just as they operate through any other illegal activity proscribed by § 13-2301. The crime of obscenity may be punished because obscenity itself is not protected by the First Amendment. Correspondingly, conducting an illegal

enterprise dealing in obscenity is punishable as a greater offense than the lesser crime of obscenity, just as the RICO statutes make many other crimes more serious when effected through racketeering.

6. Conclusion

In conclusion, we have construed the RICO statutes as they relate to a criminal prosecution involving obscenity, such that they pass constitutional muster and do not have a chilling effect on protected rights. The state's remedies against obscenity under RICO are more limited than the state's remedies against other forms of racketeering activity. These limits are required by the federal and state constitutional rights regarding freedom of speech and press. The state can no more expect to reach protected interests by means of the RICO statutes than it could by means of moral nuisance or

obscenity statutes. Book-Cellar, City of Phoenix v. Fine, 4 Ariz. App. 303, 420 P.2d 26 (1966). As stated in the dissent in State ex rel. Collins v. Superior Court [Scott]: "Abhorrence of obscenity does not outweigh our duty to uphold the constitutional rights of free speech and free press." Slip op. at 21.

Since we conclude that the trial court erred in declaring that obscenity could not be used as a predicate offense for RICO prosecutions, we vacate the trial court's order granting the motion to dismiss Count I of the indictment and remand for further proceedings consistent with this opinion.

/S/ Robert J. Corcoran
Robert J. Corcoran, Judge

CONCURRING:

/S/ William E. Eubank
William E. Eubank, Judge

/S/Donald F. Froeb
S/S Donald F. Froeb, Judge

SUPREME COURT
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DAVID R. COLE
Clerk of Court

December 2, 1987

RE: STATE OF ARIZONA vs. STEVEN FELD/LARRY CHABLER
Supreme Court No. CR-87-0253-PR
Court of Appeals No. 1 CA-CR 9471
Maricopa County No. CR-148389

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 1, 1987, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Holohan voting to grant.

Record returned to the Court of Appeals, Division One, Phoenix, this 2nd day of December 1987.

DAVID R. COLE, Clerk

TO:

Tom Collins, Maricopa County Attorney
Attn: Benjamin W. Bull, Esq.,
H. Allen Gerhardt, Esq. and
Randy H. Wakefield, Esq.
Hon. Robert K. Corbin, Attorney General
Attn: Patrick M. Murphy, Esq.,
Katrin M. Nelson, Esq.,
John B. Shadegg, Esq. and
Joseph M. Hennelly, Jr., Esq.
Richard J. Hertzberg, Esq.
Glen D. Clark, Clerk, Court of Appeals, Division One

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)
)
v.) Criminal No.
) 87-00208-A
DENNIS E. PRYBA, et al.)

MEMORANDUM

Introduction

This twelve count RICO-obscenity prosecution is the latest chapter in the continuing First Amendment-pornography saga.[1] The new twist here is the use of RICO,[2] indeed apparently the first federal prosecutorial use of RICO against purveyors of allegedly obscene materials.[3] Until 1984, federal prosecutors targeting smut had an arsenal limited chiefly to 18 USC §§ 1461 et seq. Then, in 1984, Congress expanded RICO to cover obscene materials. It did so based on a concern that organized crime was contributing to and profiting from an "explosion in the volume and availability of pornography

in our society."[4] As a result, federal prosecutors may now use RICO's stiffer penalties and forfeiture provisions[5] against sellers and distributors of allegedly obscene materials. This case is just such an attempted prosecution and this Memorandum considers and decides several dispositive threshold motions made by defendants.

Roth v. United States, 354 U.S. 476 (1957) and Miller v. California, 413 U.S. 15 (1973) are perhaps the most important of the earlier chapters in the First Amendment-pornography saga. Roth made unmistakably clear that obscenity was not constitutionally protected speech and provided a standard by which to discern obscenity, namely whether the average person,[6] applying contemporary community standards,[7] would find that the work, taken as a whole, appeals to the prurient interest.[8] This test

predictably spawned more than a decade of spirited and confusing decisions.

In 1973, in an effort to redirect the course of the law in this area, the Court, in Miller v. California, rephrased and expanded the Roth test.[9] Justice Brennan, who as the author of Roth had arguably initiated this judicial odyssey,[10] was so disillusioned by the 15 or so years of judicial wanderings under Roth that at length, he dissented in Miller and its companion case, preferring instead an absolutist, "anything goes" approach to obscenity. Chief Justice Burger, on the other hand, persuaded a majority in Miller to carry on and refine the Roth effort to draw a line between obscenity and protected speech. Given that the instant case is the latest chapter in this saga, it is perhaps only fitting that the juxtaposed views of Justice Brennan and Chief Justice Burger serve here as a preface.

Thus, in dissenting in Paris Adult Threatre I v. Slaton, 413 U.S. 49 (1973), a Miller companion, Justice Brennan noted that the effort to distinguish between protected and unprotected sexually oriented material, born of Roth, had proved so vexing, so time-consuming, and so divisive and had generated such disharmony of views[11] that the effort should be abandoned. As he put it, even after all this effort, the subject stubbornly remained ... resistant to the formation of stable and manageable standards." 413 U.S. at 73.[12] Chief Justice Burger disagreed, noting in Miller that the convenient, anything goes, absolutist approach is not the law and that the "Court must face up to the tough problem of constitutional judgment involved in every obscenity case." 413 U.S. at 29-30 (quoting Roth, 354 U.S. at 498). So in the spirit of the former Chief

Justice's words, this court now faces up to "the tough problems of constitutional judgment" raised in this novel obscenity case.

The Indictment

The indictment consists of twelve counts plus a number of RICO forfeiture allegations. of the twelve counts, three allege RICO obscenity violations, while the nine remaining counts charge felony obscenity violations under 18 U.S.C. §§ 1461 et seq.. The motions considered in this Memorandum Opinion focus solely on the three RICO counts and the accompanying forfeiture allegations.

Count I charges defendants, Dennis E. Pryba, Barbara A. Pryba, Jennifer G. Williams and Educational Books, Inc., with participating as principals in a "pattern of racketeering" involving the sale and distribution of allegedly obscene materials and with investing the

proceeds of such activities in an "enterprise" engaged in interstate commerce, in violation of 18 U.S.C. § 1962(a). The enterprise is said to consist of the Prybas, Williams, Educational Books and seven unindicted corporations.

Count II alleges that Pryba and Williams, as persons employed by and associated with the enterprise, violated 18 U.S.C. § 1962(c) by conducting the affairs of the enterprise through a pattern of racketeering activity. And in Count III, the Prybas, Williams and Educational Books are charged with a Section 1962(c) conspiracy to violate section 1962(a).

Defendants mount a two-prong attack on the RICO counts in the indictment. First, defendants argue three pleading points. Defendants assert that Counts I, II and III do not properly plead an "enterprise", as required by RICO.

Next, the defendants claim that the government has not sufficiently alleged a pattern of racketeering activity. Finally, one defendant, Educational Books, asserts that it must be dismissed from Count III because a corporation cannot be guilty of conspiring with its agents when the agents are alleged to have used the corporation to carry out their own purposes. Second, they contend these counts should be dismissed because the RICO's forfeiture provisions run afoul of the Constitution when applied to allegedly obscene materials.[13] Specifically, defendants allege that RICO's forfeiture provisions: (1) have a "chilling" effect upon the distribution of protected speech; (2) act as a prior restraint on protected speech; (3) are unduly harsh and thus violate the Eighth Amendment; (4) violate due process principles; and (5) violate the ex post

facto clause of the Constitution. Each of these contentions is separately treated.

Facts and Proceedings to Date

Defendants, Dennis E. Pryba, Barbara A. Pryba, Jennifer G. Williams, and Educational Books, Inc., own and operate or assist in operating a number of retail video stores that sell allegedly obscene material. On August 13, 1987, defendants were indicted on various counts under federal RICO alleging, inter alia, a pattern of racketeering activity involving dealing in obscene matter.[14]

On August 13, 1987, an ex parte restraining order was issued that enjoined defendants from selling, encumbering, or in any other way disposing of certain property that might be forfeitable under RICO's forfeiture provisions.[15] In addition, the August 13 restraining order prohibited

defendants from selling all video tapes, magazines, and other printed material. This order, however, was modified on August 25, 1987. The modified order permitted defendants to continue to conduct their business as normal "without substantially dissipating or diminishing the value of the assets" of their business or property.[16]

The Pleading Issues

A. The RICO "Enterprise"

Defendants argue that the enterprise alleged in the indictment does not meet the statutory definition. The alleged enterprise consists of individuals and corporations. In defendant's view, the statutory definition of "enterprise" precludes lumping together individuals and corporations. See 18 U.S.C. § 1961(4). Defendants claim that only enterprises composed solely of individuals or solely of other entities are statutorily permitted. The RICO

counts of the indictment are thus said to be fatally defective. The Court disagrees; defendant's reading of the statute does violence to the plain meaning of the statutory definition of "enterprise" and, moreover, is contrary to well-reasoned authority.

Section 1961(4) states that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity" (emphasis added). This is sweeping language; there is no reason to give it a strained, restricted scope. Legislative history confirms this. The House RICO report stated that "enterprise" included

> association in fact, as well as legally recognized associative entities. Thus infiltration of any associative group by any individual or group capable of holding a property interest can be reached.

House Rep. No. 91-1549, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Ad. News 4007, 4032 (emphasis added).[17] The Supreme Court, in another context, has also recognized the expansiveness of the term "enterprise". In United States v. Turkette, 452 U.S. 576 (1981), the Court rejected an argument that "enterprises" should be limited to legitimate business. In reaching this conclusion, the Court noted, "Congress opted for a far broader definition of the word "enterprise.'"[18] It also stated that "[t]here is no restriction upon the associations embraced by the definition [in § 1961(4)]."[19]

To accept defendants' argument that the term "enterprises" does not embrace individuals together with other entities, this Court would have to ignore the plain meaning of the word "includes" and find that Congress used the word to indicate that the list

following was exhaustive, not merely illustrative. Nothing warrants such a construction; plain meaning and legislative intent are to the contrary, as is the sparse, but well-reasoned and uniform existing authority. The Fifth Circuit in United State v. Thevis, 665 F.2d 616 (5th Cir. 1982), cert. denied, 459 U.S. 825 (1982) succinctly dealt with this point. It stated:

> Appellants contend that because the indictment described the enterprise as "a group of individuals associated in fact with various corporations," the enterprise alleged did not fall within the literal bounds of the statutory classifications. We reject this claim.
>
> * * *
>
> We are convinced ... that RICO covers the enterprise alleged in this case. Use of the verb "includes" in the statutory definition indicates congressional intent not to limit a RICO enterprise to the specific categories listed; rather, the language "reveals that Congress opted for a far broader definition of the word 'enterprise'."

665 F.2d at 625 (quoting United States v. Turkette, 452 U.S. 576, 593 (1981)). The Third Circuit reached the same result, noting that:

> We see no indication that Congress intended to restrict the definition of "enterprise" to a number of entities or individuals that all fall within the same category.

United States v. Aimone, 715 F.2d 822, 828 (3d Cir. 1983), cert. denied, 468 U.S. 1217 (1984).[20]

Defendants argue that a different result should obtain here because the Fourth Circuit in United States v. Computer Sciences Corp. [CSC], 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983), commands that the rule of lenity applies in RICO cases and thus "includes" must be construed strictly. The case and the rule are inapposite here. CSC dealt with a point not here presented. It held that an unincorporated division of a corporation could not be lumped with the corporation

to form an "enterprise." CSC did not address the argument of these defendants. Further, while the rule of lenity undoubtedly applies in RICO cases in appropriate circumstances, those circumstances are not present here. This is not a case where fairness and notice militate in favor of construing an ambiguity with leniency toward a defendant; rather, this is a case where the plain and ordinary meaning of the term "includes" does not fairly admit to the construction defendants' urge.

In sum, CSC is inapposite here. The plain meaning of the language defining "enterprise," the legislative history of the provision, and all the pertinent authority to date support this Court's conclusion that a RICO enterprise can consist of individuals lumped together with corporations or other legal entities.

B. Pattern of Racketeering Activity

Defendants argue that the three RICO counts do not sufficiently allege the requisite "pattern of racketeering activity."[21] In essence, defendants argue that the activity alleged in the indictment constitutes a single scheme, not separate acts. This indictment, they claim, is analogous to the one at issue in International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987). There the issuance of a fraudulent prospectus was held to be a single, unitary scheme, not a RICO pattern of racketeering.

Defendants' argument is unpersuasive. Zepkin is not in point. In contrast to the issuance of a prospectus, this indictment alleges a series of separate but related acts dealing with the sale and distribution of obscene material. The allegations fit squarely within RICO, which defines a "pattern" as "at least two acts" and "racketeering

activity" as including "dealing in obscene matter." 18 U.S.C. § 1961(5), (1)(A). The following legislative history from the RICO Senate Report dispels any doubt that this indictment properly pleads a pattern of racketeering:

> The target of [RICO] is ... not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

S. Rep. No. 617, 91st Cong., 1st Sess. 158 (emphasis added), quoted in Sedima, S.P.R.L. v. IMREX Co., Inc., 473 U.S. 479, 496 n. 14 (1985). The Fourth Circuit interprets this language to require that "the predicate acts must be related and must be a part of a continuous criminal endeavor." Zepkin, 812 F.2d at 154. This indictment, therefore, properly pleads a "pattern of racketeering activity."

C. Conspiracy

The corporate defendant, Educational Books, Inc., asserts that Count III deserves dismissal because, contrary to the indictment's allegations, the corporation cannot conspire with its own agents. In essence, this defendant urges the application in this context of the civil intracorporate conspiracy rule. See McIntyre's Mini Computer Sales Group, Inc. v. Creative Synergy Corp., 644 F. Supp. 580, 585 (E.D.Mich. 1986). Dispositive of this claim is that an exception to the intracorporate conspiracy exists in the criminal arena. See e.g., United States v. Peters, 732 F.2d 1004, 1008 (1st Cir. 1984).

The Constitutional Issues

A. Chilling Effect of RICO

Defendants claim that RICO chills protected speech for two reasons: first, it is said that purveyors will be deterred from dealing in non-obscene

erotic literature given the breadth and vagueness of the underlying criminal offense, i.e., obscenity. Second, it is urged that RICO's forfeiture provisions are so draconian as to deter dealers from dealing in protected speech at the margin. In other words, vague definitions of obscenity force purveyors to guess about the status of some "speech" at the margins, and they will be deterred from such guessing by the risk of criminal prosecution and the severity of potential sanctions. The victim, defendants contend, will be protected speech at the margins, presumably erotic works that skirt the boundary but do not cross over into the realm of obscenity.[22]

The gravamen of both prongs of this attack is the alleged excessive vagueness and breadth of the statutory proscriptions, one state (Va. Code Ann. § 18.2-372), one federal (18 U.S.C. §

1461 et seq.), that are the predicates for a RICO violation. The short answer is that both statutes have already passed constitutional muster. They have been found to give "adequate warning of the conduct proscribed" so as to permit the law to be fairly administered. See Roth v. United States, 354 U.S. 476, 491 (1957).

The federal obscenity statute, 18 U.S.C. § 1461 et seq. and its predecessors, has passed constitutional muster more than once.[23] The same is true of the Virginia analog, Va. Code Ann. § 18.2-3774.[24] Both frame offenses in language that "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices..., give[s] adequate warning of the conduct proscribed and mark the 'boundaries sufficiently distinct for judges and juries fairly to administer the law.'"

Roth v. United States, 354 U.S. at 491-92 (1957) (quoting United States v. Petrillo, 332 U.S. 1, 7-8 (1947)). To be sure, there may be some fuzziness at the boundaries, but absolute precision is neither practical nor constitutionally required.

> That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense ....

Roth, 354 U.S. at 491-92. Defendants' First Amendment chilling argument is, therefore, unfounded insofar as it rests on the alleged vagueness of the underlying obscenity statutes. Both are adequately precise.

A somewhat different question is presented by the application of RICO forfeiture remedies in obscenity prosecutions. So draconian are they, the defendants claim, that the unconstitutional chilling that occurs is

tantamount to a prior restraint.[25] The court turns to this argument.

B. Prior Restraint

Defendants argue that RICO's forfeiture provisions (18 U.S.C. § 1963) operate in alleged obscenity cases, as here, as impermissible prior restraints. Heavy reliance is placed on Near v. Minnesota, 283 U.S. 697 (1931) and its progeny which make unmistakably clear the courts' hostility toward prior restraints.

The flaw in this argument is the recognized distinction between prior restraints and subsequent punishment. The evil of a prior restraint is that speech is suppressed before its status is judicially determined. Such restraints are far more likely to chill, indeed to suppress, free speech than subsequent punishment, which can be imposed only after there is the procedural safeguard of a disinterested

judicial determination concerning the alleged illegality. A person is punished for speech-related conduct only after he is given the opportunity to litigate, inter alia, the constitutionality of the statute, either facially or as applied to him. In obscenity cases, he is also permitted to present the material to a jury and attempt to persuade it, under Miller, that the material deserves constitutional protection. Prior restraints deprive "speakers" of these important safeguards. Thus it is that prior restraints are disfavored and come into court "bearing a heavy presumption against ... [their] constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).[26] Such restraints operate to compel a "speaker" to forego his First Amendment rights.

This is not to say that subsequent punishment schemes such as RICO's forfeiture scheme have no chilling effect whatever. Surely it has some; indeed, it is designed to accomplish just that end. But this "chilling" is a wholly legitimate consequence of the RICO forfeiture provisions or any other criminal penalty.[27] Deterrence (or chilling) through the threat of prosecution and punishment is a legitimate goal of the criminal law. Once it is decided that obscenity does not merit First Amendment protection and indeed, once it is decided that obscenity is so pernicious that it should be criminally proscribed, then a subsequent punishment, like RICO's forfeiture scheme, is a sensible and wholly legitimate law enforcement weapon. It is specially designed to chill or deter proscribed, unprotected speech; unconstitutional chilling occurs

only if the definition of obscenity is excessively broad or vague so that some protected speech is unintentionally ensnared in the imprecise net that is cast.[28]

Nor is it significant that the forfeiture penalty may impact adversely on defendants' future speech. That fact alone does not mean that the First Amendment is implicated. The Constitution does not forbid punishment for a crime simply because that punishment might affect free expression. As the Court in Arcara v. Cloud Books, 106 S.Ct. 3172, 3178 (1986) pointed out,

> book selling in an establishment used for prostitution [or distribution of obscene materials] does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises.

In summary, an attack on the RICO forfeiture provisions as a prior restraint misses the mark.[29] Subsequent punishments are simply not prior

restraints. They are applied only after the due process of a criminal trial and whatever chilling effect they may have is legitimate and intended.[30]

Only meager authority exists on the constitutionality of RICO or RICO-type forfeiture provisions in obscenity cases. What does exist, however, supports this court's conclusion that RICO's forfeiture provisions do not operate to offend the First Amendment in obscenity cases. The sole federal case is Western Business Systems, Inc. v. Slaton, 492 F.Supp. 513 (N.D.Ga. 1980), which rejected a claim that Georgia's RICO forfeiture provisions constituted an impermissible prior restraint on protected speech. There, plaintiffs, purveyors of sexually explicit material, sought to enjoin prospective obscenity prosecutions under the Georgia RICO statute on the ground that forfeiture of property acquired with racketeering

proceeds amounted to a prior restraint on presumptively protected speech.

The Georgia RICO forfeiture provisions, like those of the federal statute, make subject to forfeiture all property "of whatever nature, no matter how inoffensive, if it is acquired with racketeering proceeds." Id. at 514. The point to be kept in mind, as that court saw it, is that:

> Forfeiture could apply to any chattel whatever, if it was acquired with the proceeds of racketeering. Thus, if the items seized are books or movie films, the seizure is totally unrelated to their contents. They would be forfeited under the statute not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime.

Id.

Ultimately, the court in Western Business Systems refused an injunction, concluding that "plaintiffs' arguments regarding the forfeiture provisions are inadequate to create a genuine suppression of speech issue." Id.

The Indiana Supreme Court reached a similar result in 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987), a case involving the Indiana RICO statute. That court, noting a dearth of pertinent authority, found Western Business Systems persuasive and ruled that the Indiana RICO, patterned after the federal act, was not an unconstitutional prior restraint. In the words of that court,

> We agree with ... [Western Business Systems'] reasoning that the purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question. The overall purpose of the anti-racketeering laws is unequivocal, even where the predicate offense alleged is a violation of the obscenity statute. The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene.

4447 Corp., 504 N.E.2d at 565.

The third and most recent pertinent decision is Arizona v. Feld, No. 148389 (Ariz. Ct.App. 1987). There, an Arizona appellate court struck down portions of the Arizona forfeiture provisions insofar as they purported to reach property essentially unconnected with the racketeering activity.[31] Such provisions are not here in issue.[32] Significantly, however, that court upheld those portions of the Arizona statute that most closely resemble the RICO forfeiture provisions. The forfeiture provision upheld in Feld, Arizona Code § 13-2314(D)(6), are essentially similar to RICO's and provide as follows:

> 6. Forfeiture to the general fund of the state or county as appropriate to the extent not already ordered to be paid in other damages:
>
> (a) Any property or other interest acquired or maintained by a person in violation of § 13-2312.
>
> (b) Any interest in, security of, claims against or property, office,

> title, license or contractual right of any kind affording a source of influence over any enterprise or other property which a person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.
>
> (c) All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities, property and other things of value used or intended to be used to facilitate commission of the offense.

The Arizona court approved these forfeiture provisions stating:

> The remedy in subsection (D)(6)--forfeiture of interests or proceeds--is proper to the extent that the obscene materials themselves, or proceeds from materials determined to be obscene, may be seized. Also, as held in Western Business Systems, items of the enterprise could be forfeited if they were gains from other racketeering activity. Racketeering proceeds cannot be laundered merely by being invested in bookstores.

Feld, slip op. at 140-41 (emphasis added).

Further support exists for this Court's holding that RICO's forfeiture

provisions do not act as an unconstitutional prior restraint. The Sixth Circuit, in 511 Detroit Street v. Kelley, 807 F.2d 1293 (6th Cir.), held that a state obscenity law, which imposed very large fines for obscenity violations, was not an unconstitutional prior restraint on expression. There, Michigan's obscenity laws provided for a $100,000 fine for a first offense and a mandatory $50,000 to $5,000.000 fine for a subsequent offense. The district court reasoned that the large fines made the statute "the equivalent of an unconstitutional padlocking or closure law." Id. at 1298 (citations omitted). On appeal, the Sixth Circuit reversed the district court, stating:

> We refuse to hold that a statute threatening fines that could impair the operation of a business is an impermissible prior restraint on expression, even where that business also involves dissemination of protected materials. The fact that a person does some business disseminating protected materials cannot

> immunize that person from large fines that may be imposed for violation of criminal law.

Id. at 1299.

In summary, this Court concludes that principle and authority confirm that RICO's forfeiture provisions, construed to reach the ill-gotten gains of racketeering activity, are not facially invalid prior restraints on protected speech.

The heart of this matter is that Congress has found that organized crime uses and exploits obscenity to further its pernicious aims and, therefore, that a pattern of racketeering activity observed deserves the forfeiture sanction. The fact that the racketeering activity involves expresive conduct is irrelevant. The First Amendment cannot be a shield for illegal activity. RICO's forfeiture provisions are no more of a restraint on free speech than is any felony conviction or prison

sentence. Both of the latter are provisions that in some respect restrain speech but neither can be coherently termed a First Amendment violation. Logic dictates the same conclusion for RICO's forfeiture provision. The forfeiture remedy, properly construed and applied, does not impermissibly restrain further dissemination of speech, but rather simply requires those engaged in racketeering acts to disgorge their ill-gotten gains.

C. Eighth Amendment

Defendants claim that RICO's forfeiture provisions constitute excessive fines or cruel and unusual punishment in violation of the Eighth Amendment. Neither argument is persuasive. On their face and construed to reach only racketeering's ill-gotten gains, the forfeiture provisions seem eminently apt and suitable to their undoubtedly legitimate purpose. As such, they are

neither excessive fines, nor cruel and unusual punishment. The Fourth Circuit confirmed this conclusion in United States v. Grande, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 830 (1980). It found that

> The magnitude of [RICO] forfeiture is directly keyed to the magnitude of the defendant's interest in the enterprise conducted in violation of the law. Accordingly, we conclude that it is not cruel and unusual in the constitutional sense.

Id. at 1039.[33] On its face, therefore, the RICO forfeiture sanction meets the Eighth Amendment standard.

To be sure, a specific forfeiture may run afoul of the Amendment's proportionality requirement.[34] In Solem v. Helm, 463 U.S. 277 (1983),[35] the Supreme Court declared unconstitutional a life sentence imposed without possibility of parole and set forth a three-part test to use in reviewing the proportionality of sentences under the Eighth Amendment. Id. at 290-303. Certain language in the

Court's opinion implied that all criminal sanctions are subject to proportionality analysis under the Eighth Amendment:

> [W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional. As the Court noted in Robinson v. California, 370 U.S., at 667, a single day in prison may be unconstitutional in some circumstances.

463 U.S. at 290 (citation omitted).

The Fourth Circuit, however, in United States v. Rhodes, 779 F.2d 1019 (4th Cir. 1985), held that a severe sentence for a term of years did not require a proportionality analysis. Id. at 1027-28. The court interpreted Solem as requiring an extensive proportionality analysis "only in those cases involving

life sentences without parole." Id. at 1028. In light of Rhodes, it appears that RICO's forfeiture provisions do not require a proportionality analysis. Yet even if such an analysis is required, no final judgment can be made as to proportionality until the matter is tried. Any attempt to perform a proportionality analysis now would be premature. It is enough at this point for this Court to conclude, as it does, that RICO's forfeiture provisions are facially valid and that the forfeiture allegations in this indictment, if proved, are not on their face unconstitutionally disproportionate.[36]

D. RICO Forfeiture Does Not Violate Due Process

The Fourth Circuit has addressed the issue of whether RICO's forfeiture provisions violate the Fifth Amendment's due process clause and concluded that they do not. United States v. Grande,

620 F.2d 1026 (4th Cir. 1980). After careful historical analysis, the Court correctly concluded that RICO's provisions are much narrower than the broad forfeiture proscribed by Article III, §3, cl. 2 of the Constitution.[37] Thus, RICO forfeiture is not unconstitutional as a "forfeiture of estate." Id. at 1039.

E. Ex Post Facto

Finally, defendants argue that RICO's forfeiture provisions, as applied to property acquired prior to 1984,[38] are violative of ex post facto laws. Yet all courts that have considered whether RICO violates the ex post facto clause of the Constitution have uniformly concluded that it does not. E.g., United States v. Brown, 555 F.2d 407, 416-17 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Campanale, 518 F.2d 352, 364-65 (9th Cir. 1975), cert denied, 423 U.S. 1050

(1976). Indeed, the Senate Judiciary Committee, in drafting RICO, specifically considered this issue and reached the following conclusion:

> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws and bills of attainder. Anyone who has engaged in the prohibited activities before the effective date of the legislation is on prior notice that only one further act may trigger the increased penalties and new remedies [including forfeiture] of this chapter.

S. Rep. No. 617, 91st Cong., 1st Sess. 158-160 (1970). It is clear from RICO's legislative history and subsequent case law that RICO is not constitutionally infirm as an ex post facto law. Accordingly, defendants' properties acquired by proceeds of racketeering activity are subject to forfeiture, provided all other requirements are met, even though they were purchased prior to 1984.

CONCLUSION

The application of the RICO criminal forfeiture sanctions to the crime of obscenity raises novel and important constitutional issues. This Court concludes, at length, that Congress' decision to use RICO as a weapon against purveyors of obscenity does not offend the Constitution. This is so because the RICO criminal forfeiture provisions, as applied to obscenity, require that there be a nexus between the obscenity purveyor's ill-gotten racketeering gains and any protected material seized. Post conviction seizure of arguably protected materials and assets is constitutionally permissible where there is proper proof that they were acquired or maintained with the ill-gotten gains from racketeering activity, including dealing in obscenity. Therefore, RICO and its forfeiture provisions do not unconstitutionally chill protected speech or act

as prior restraints. To be sure, RICO's sanctions are severe, but severity alone does not cause unconstitutional chilling or convert these sanctions into prior restraints.[39] In adding obscenity to RICO, Congress has stayed within constitutional bounds.

An order has been entered reflecting the Court's rulings on these issues. It remains only for the Court to note that the arguments and briefs of counsel for all the defendants and the United States reflected competency, energy (on occasion, perhaps, to an excess) and ingenuity.

The Clerk of this Court is directed to send copies of the Memorandum Opinion to counsel of record.

/S/ T. S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
November 3, 1987

FOOTNOTES

[1]See generally F. Schauer, The Law of Obscenity (1976).

[2]Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1984).

[3]State prosecutions under state RICO statutes apparently antedate federal efforts. See 4447 Corp. v. Goldsmith, 479 N.E.2d 578 (Ind.App. 1985), vacated, 504 N.E.2d 559 (Ind. 1987); Arizona v. Feld, No. 148389 (Ariz.Ct.App. 1987); Western Business Sys., Inc. v. Slaton, 492 F.Supp 513 (N.D.Ga. 1980) (applying Georgia RICO statute).

[4]130 Cong. Rec. 5434 (Jan. 30, 1984) (remarks of Senator Helms); Russello v. United States, 464 U.S. 16, 26 (1938) (RICO's "purpose is to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.").

[5]RICO's criminal penalties provide that whoever violates any provisions of RICO "shall be fined not more than $25,000 or imprisoned not more than twenty years, or both." 18 U.S.C. § 1963(a) (1982 & Supp. 1984).

RICO's forfeiture provisions provide that a person convicted of a RICO offense shall forfeit to the United States:

> (1) any interest the person has acquired or maintained in violation of section 1962 ["Prohibited activities"];
> (2) any --
> (A) interest in;
> (B) security of;

(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over;
any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

18 U.S.C. § 1963(a) (1984).

[6]In deciding whether the material appeals to a prurient interest, the jury must avoid subjective personal or private views. The average person is the judge and not the object of the test. The jury must evaluate what judgment will be made by a hypothetical average person applying the collective view of the adult community. Pinkus v. United States, 436 U.S. 293, 300-01 (1978). The Court in Pinkus held that "children are not to be included ... as part of the 'community.'" Id. at 297; see also Brockett v. Spokane Arcades, 105 S.Ct. 2794 (1985). In addition, there is no requirement that the average person be sexually aroused or excited by the material. United States v. Gugliemi, 819 F.2d 451 (4th Cir. 1987).

[7]The "contemporary community standard" is to be applied by the jury only when examining the first two prongs of Miller, namely the "prurient appeal" and "patent

offensiveness" prongs. See infra note 22 (discussing the three-prong Miller test). The third prong of Miller, the "serious literary, artistic, political, or scientific value" prong, is determined not by the application of the contemporary community standard, but rather by the traditional "reasonable man" standard. See Pope v. Illinois, 107 S.Ct. 1918 (1987).

[8]In Roth v. United States, 354 U.S. 476 (1957), the Court defined "prurient interest" as follows:

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters ....

Id. at 487 n.20. It is evident that the Court saw no significant difference between the A.L.I. Model Penal Code definition of "prurient" (shameful or morbid), and the meaning of "prurient" as it had been developed in the case law (lustful and lascivious) up to 1957. It is worth noting that the comments to the Model Penal Code make it clear that "prurient" is not limited to "shameful" or "morbid", but encompasses a broader use of those terms.

[9]Miller clarified the law in several respects, including principally (a) the abandonment of the "utterly without redeeming value" standard announced in Memoirs v. Massachusetts, 383 U.S. 413 (1966), and (b) the rejection of a national

standard for the community. The former imposed an unrealistic burden on the prosecutor, while the latter simply made the common sense point that citizens of Virginia or Wisconsin may well not be willing to find acceptable depictions of sexual conduct that would be acceptable to citizens of Las Vegas or New York.

[10]Some choose to trace the origin of the saga to Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) which originated the "fighting words" doctrine and listed obscenity among the types of speech unprotected by the First Amendment.

[11]The best known, most memorable, and arguably, most candid comment made on the post-Roth the line-drawing difficulties in obscenity cases was Justice Stewart's in a concurring opinion in Jacobellis v. Ohio, 378 U.S. 184 (1964). He noted that the hard core pornography that was unprotected under the Constitution might be impossible to define but, he said, "I know it when I see it." Id. at 197.

[12]Justice Harlan was moved to describe as "intractable" the judgments required and the problems raised in obscenity litigation. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704 (1968) (Harlan J., dissenting).

[13]This court is not faced with the question of whether the restraining order is unconstitutional. This matter was addressed and decided by another Judge of this Division when defendants

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moved to dismiss the restraining order on September 4, 1987.

[14]RICO was amended in 1984 to include "dealing in obscene matter" as a racketeering activity.

> "Racketeering activity" means any act or threat involving ... dealing in obscene matter, ... which is chargeable under state law and punishable by imprisonment for more than one year ....

18 U.S.C. § 1961(1)(A).

[15]The restraining order provided, in part, that defendants were prohibited from disposing of certain real property, automobiles, bank accounts, stocks, and other personal property that might be forfeitable under RICO. Title 18 U.S.C. § 1963(a) provides for three types of forfeiture: (1) any interest acquired or maintained in violation of § 1962; (2) any property affording a source of influence over the enterprise; and (3) any property derived from the proceeds of racketeering activity. If defendants are found to be guilty of dealing in obscene matter, then the real and personal property described in the restraining order might be forfeitable under section 1963(a).

[16]The modified order, dated August 25, 1987, provided that defendants "shall be permitted to conduct [their] business as normal without substantially dissipating or diminishing the value of the assets of the property described ... in the original restraining order." Defendants were permitted to carry on

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their business using a specific bank account.

The modified order also permitted defendants the use of funds for "reasonable attorneys' fees." The Court has instructed defense counsel to maintain a careful accounting of all fees received.

[17]For further discussion of RICO's legislative history and purpose, see United States v. Turkette, 452 U.S. 576, 588-93 (1981) (confirming that Congress intended to give broad scope to the term "enterprise").

[18]Turkette, 452 U.S. 576, 593 (1981) (RICO "enterprises" not limited to legitimate business; enterprises may include illegitimate as well as legitimate businesses).

[19]Id. at 580. This may be a modest overstatement as it appears unlikely that a state or municipality itself may not be of an enterprise. See United States v. Mandel, 415 F.Supp. 997 (D. MD. 1976), supplemented, 415 F.Supp. 1025.

[20]See also United States v. Huber, 603 F.2d 387, 392-94 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1986) ("enterprise" can include more than one corporation).

[21]See 18 U.S.C. § 1961(1),(5), 1962(a),(c).

[22]The existing border demarcating the line between protected speech and obscenity is given by Miller v. California, 413 U.S. 15 (1973). Speech may be banned as obscene where:

EDITOR'S NOTE

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(a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
(b) the work describes, in a patently offensive way, sexual conduct defined by the applicable state law; and
(c) the work, taken as a whole, lacks serious literary, political, or scientific value.

413 U.S. at 24. Thus, as J.R. Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984), rev'd on other grounds sub nom. Brockett v. Spokane Arcades, 105 S.Ct. 2794 (1985) indicates, works that merely arouse normal sexual responses (in contrast to shameful or morbid sexual responses) may be constitutionally protected even if they contain an isolated example of a patently offensive description of sexual conduct and even if the works lack the redeeming value defined in Miller. Eikenberry, 725 F.2d at 490-92. It is presumably, this speech that is at risk at the margin.

[23]Smith v. United States, 431 U.S. 291 (1977); Hamling v. United States, 418 U.S. 87 (1974); see, e.g., Roth v. United States, 354 U.S. 476, 491 (1957).

[24]There can be little doubt of the constitutionality of the Virginia statute as its language tracks closely the three part test announced in Miller v. California, 413 U.S. 15 (1973). The constitutionality of an earlier, less precise version was upheld in Grove Press, Inc. v. Evans, 306 F.Supp. 1084 (E.D.Va. 1969); see also Educational Books, Inc. v.

Commonwealth, 223 Va. 392, 323 S.E.2d 84 (1984).

[25]A "prior restraint" is defined as "the imposition of a restraint on a publication before it is published." Black's Law Dictionary 1074 (5th ed. 1979). Courts often use the terms "prior restraint" and "chilling effect" interchangeably. See, e.g., Arizona v. Feld, No. 148289 (Ariz.Ct.App. 1987). Yet "chilling effect" refers to the distribution of material, not publication. Although a statute may not amount to a prior restraint on publication, it may cause a chilling effect on distribution. See United States v. John Doe (Model Magazine), No. 86-5159 (4th Cir. Sept 24, 1987).

[26]It is worth noting that judicial antipathy toward prior restraints does not mean that all such restraints are per se unlawful. Even Near recognized there might be "exceptional cases" in which a prior restraint might be lawful. The Court gave as examples publication of sailing dates of naval ships and the number and location of troops. 283 U.S. at 716; see also Freeman v. Maryland, 380 U.S. 51 (1965) (occasions exist where prior restraint may be imposed so long as the censor's judgment is subject to immediate court scrutiny).

[27]One commentator argues the contrary. See Mayton, Toward A Theory of First Amendment Process: Injunction of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245 (1982). But see Redish, The Proper Role of the Prior

Restraint Doctrine in First Amendment Theory, 70 Va. L. Rev.53 (1983).

[28]Defendants cite J.R. Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984), rev'd on other grounds sub nom. Brockett v. Spokane Arcades, 105 S.Ct. 2894 (1985), in support of their claim that RICO punishes protected speech. There, the Ninth Circuit held unconstitutional a state statute that permitted a fine to be imposed against a defendant found guilty of dealing in obscene matter. Such a fine was to be based, in part, on profits made from the sale of protected as well as unprotected material. The court applied "the familiar requirement that statutes punishing expressive conduct 'must be carefully drawn ... to punish only unprotected speech and not be susceptible of application to protected expression.'" Id. at 494 (quoting Gooding v. Wilson, 405 U.S. 518, 522 (1972)). Yet, Eikenberry is inapposite. There, no nexus was required between the sale of obscene matter and protected speech. A defendant could be fined for the profits made on protected matter simply because obscene material was also sold in the same place of business. RICO forfeiture, however, requires a nexus between the sale of obscene matter and protected material. Profits from the sale of protected material may be forfeited only if they are traceable to the sale of obscene matter. Thus, RICO does not punish the sale of protected speech; rather, the provisions act in personam to punish a guilty defendant. "[P]roperty forfeitable under RICO need not be guilty.' RICO forfeiture is aimed at divorcing guilty

persons from the enterprises they have corrupted." United States v. Cauble, 706 F.2d 1322, 1350 (5th Cir. 1983).

[29]Defendants also cite a recent Fourth Circuit decision, United States v. John Doe (Model Magazine), Nos. 86-5159, 86-5171, 86-5173 (Sept. 24, 1987), in support of their claim that RICO's forfeiture provisions are unconstitutional. This reliance is misplaced; Model Magazine is inapposite. There, the court held that a subpoena impermissibly "chilled" protected speech. Specifically, the subpoena demanded all video tapes depicting a broad range of sexual activity. So worded it was manifestly overbroad. It crossed the Miller-Roth line. Thus, that court reasoned that movie sellers would simply self-censor protected as well as unprotected material because the subpoena was excessively broad.

RICO is not overly broad in scope; it "chills" only the distribution of unprotected expressions; a dealer need only self-censor obscene matter to avoid RICO's forfeiture penalties. This type of chilling or self-censorship is constitutionally permissible and Congress manifestly intended that it occur.

[30]This does not mean that subsequent punishment is wholly immune from constitutional attack; it is only immune from attack on the ground that it is a prior restraint. Subsequent punishment may be vulnerable on other grounds. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (punishment for release of information concerning

confidential investigation of a judge struck down on First Amendment grounds).

[31] In doing so, the Arizona court criticized the Indiana Supreme Court's decision in 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987), opting instead to follow the Indiana intermediate appellate court decision at 479 N.E.2d 578 (1985). The latter court had invalidated the Indiana RICO provisions as applied to obscenity on grounds that they were prior restraints on putatively protected speech and for failure to comply with procedural safeguards and to use less restrictive means. The Indiana Supreme Court vacated this ruling. This court does not find persuasive, and therefore does not follow, the reasoning of the Indiana appellate court in 4447 Corp. or that of the Arizona appellate court in Feld insofar as either decision is construed to invalidate forfeiture provisions extending only to assets that are involved in or are the fruits of the illegal racketeering activity, the so-called "ill-gotten gains." This court considers and decides here that such RICO forfeiture provisions are not impermissible prior restraints and not facially unconstitutional. We do not consider or decide whether the specific pre-conviction seizure activities under the forfeiture provisions in this case permissibly or impermissibly prevented the circulation of presumptively protected materials. See supra note 13. This seemed to be the focus of the Indiana appeals court as the state had padlocked the stores, seized books, magazines, films and the like only a relatively small part of which had been alleged to be obscene. Thus, the focus of the Indiana appellate

court decision seemed to be the specific pre-conviction application of the RICO provisions in that case. No such seizure and padlocking are here in issue. Rather, the issue presented here is whether the RICO forfeiture provisions, construed to extend only to ill-gotten gains of the racketeering activity, are facially unconstitutional as prior restraints on protected speech.

[32]The Arizona RICO post-conviction remedies held unconstitutional in Feld are as follows:

> (1) Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.
>
> (2) Imposing reasonable restrictions on the future activities or investments of any person ....
>
> (3) Ordering dissolution or reorganization of any enterprise.

Ariz. Rev. Stat. Ann. § 13-2314(D)(1)-(3).

These provisions are identical to the RICO civil penalties set forth in 18 U.S.C. § 1964(a). Yet the constitutionality of RICO's civil penalties is not in issue here; this is a criminal proceeding. Even assuming these civil penalties are unconstitutional, the criminal forfeiture provisions here in issue need not fail. There exists "the elementary principle that the same statute may in part be constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand and that which

is unconstitutional may be rejected." Allen v. Louisiana, 103 U.S. 80, 83-84 (1881), quoted in Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985); see also Feld, slip. op. at 144. Thus, the Court need not and will not address the constitutionality of RICO's civil penalties as they apply to obscenity cases. This Court is well aware of "the cardinal rules governing the federal courts: '[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" Brockett, 472 U.S. at 501 (quoting United States v. Raines, 362 U.S. 17, 21 (1960)).

[33]See also United States v. Huber, 603 F.2d 387 (2d Cir. 1979).

[34]The Ninth Circuit in United States v. Busher, 817 F.2d 1409, 1414-15, n.9 (9th Cir. 1987) criticizes Grande for misapplying the proportionality requirement. This criticism seems to miss the mark and in any event does not diminish the persuasiveness of Grande on the questions of the facial validity of RICO's forfeiture provisions under the Eighth Amendment.

[35]In Solem, the Court held that a life sentence without parole was unconstitutionally disproportionate.

[36]There may indeed be circumstances where the forfeiture ordered, in light of all circumstances, is unconstitutionally disproportionate.

See Busher, 817 F.2d at 1414. Yet, whether this court has authority to mitigate or adjust the jury's forfeiture verdict is unclear. See, e.g., United States v. Kravitz, 738 F.2d 102, 104 (3d Cir. 1984) (under 18 U.S.C. 1963(a) forfeiture is mandatory upon finding that appellant's property was used to promote racketeering). See generally Reed, Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes, 22 Am. Crim. L.Rev. 747, 770 (1985) (discussing authority of district courts to mitigate jury's forfeiture verdict). In any event, this issue is not yet before the Court.

[37]Article III, § 3, cl. 2 of the Constitution reads: "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." Article III, § 3, cl. 2 of the Constitution was supplemented by the first congress, which enacted 1 Stat. 112, 117 (1790), presently codified as 18 U.S.C. § 3563. Currently, that section reads: "No conviction or judgment shall work corruption of blood or any forfeiture of estate.

[38]In 1984 RICO was amended to include dealing in obscene matter as a "racketeering activity." See supra note 4 and accompanying text.

[39]The crux of defendants' chilling and prior restraint arguments is the alleged excessive vagueness of the obscenity standard. This attack was long ago laid to rest in Roth and its progeny. The Miller-Roth standard is a middle ground between the absolutism that would allow, indeed protect, all

obscene expression and a philosophy that states should have unfettered discretion to ban as much or as little sexually explicit expression as they wish. The genius of this middle ground solution is that it defines obscenity; it does not prohibit it. That decision is left in the first instance to the people acting through Congress or their state legislatures. Conceivably, the people might choose to legalize dissemination of obscene expressions. The people have not so chosen. They have, on the contrary, chosen to exercise their right to proscribe obscenity. The Miller-Roth middle ground also maximizes the people's power over the regulation of obscenity by giving juries the right to decide cases under a temporally and geographically flexible community standard. This may result in an imperfect or imprecise line between obscenity and protected speech, but not an unconstitutional one.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 1988, three copies of the foregoing petition for writ of certiorari were sent by U.S. mail, postage prepaid, to:

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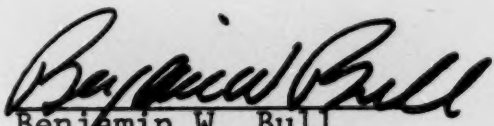
All parties required to be served have been served.



Benjamin W. Bull

Supreme Court, U.S.
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No. 87-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF ARIZONA,

Petitioner,

—v—

STEVEN FELD, LARRY CHABLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Is an intermediate state court decision upholding a state statute and construing it according to a state prosecutor's suggestions reviewable by the United States Supreme Court at the request of that prosecutor?

2. Does an order of an intermediate state court denying a Motion to Dismiss but limiting the scope of available forms of relief at trial constitute a sufficiently "final" ruling of a state court of last resort to give this Court certiorari jurisdiction?

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No. 87-1246

IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF ARIZONA,
Petitioner,
v.
STEVEN FELD, LARRY CHABLER,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

RESPONDENTS' STATEMENT OF THE CASE

The State of Arizona procured a four-count indictment of Respondents, three counts of which related to the rental of allegedly obscene materials. Count One of the indictment was for racketeering. Although Count One did not allege a predicate offense or disclose what the predicate offense for the racketeering Count was or whether in fact there was a predicate offense, the

State's position was that it must have been for obscenity.

Respondents claimed that the RICO statute, with obscenity as the predicate offense, was unconstitutional. The trial court agreed and dismissed Count One. Before trial, and before all defense motions were filed and heard, the State appealed the dismissal of Count One. The Arizona Court of Appeals reversed, upholding the statute. The Court of Appeals adopted constructions urged upon it by the Petitioner herein. The Arizona Supreme Court refused to review the case in its present posture. The case is now back in the Superior Court for trial. When proceedings in this Court are terminated, Respondents will file in the trial court, inter alia, a motion claiming that the RICO count is defective on its face under Arizona law for failure to allege a

predicate offense. See **Baines v. Superior Court In and For Pima County**, 142 Ariz. 145, 688 P.2d 1037, 1041, n.2, 1042-3 (App. 1984).

REASONS FOR DENYING THE WRIT

I. THERE IS NO CASE OR CONTROVERSY. PETITIONER LACKS STANDING BEFORE THIS COURT BECAUSE PETITIONER PREVAILED BELOW. THE ARIZONA COURT OF APPEALS UPHELD THE STATUTE AND CONSTRUED IT EXACTLY AS PETITIONER REQUESTED.

The Arizona Court of Appeals upheld the statute and construed it so that a bookstore selling religious materials, newspapers, historical novels, etc. could not be closed by divesture, dissolution, closure or otherwise because of the sale of one obscene item. That construction is "binding (on this Court) as though the precise words had been written into the ordinance". **Terminiello v. Chicago**, 337 U.S. 1, 4 (1949).

Accordingly, Arizona now has an obscenity/RICO statute which affords the

State many remedies, but not the remedy barred by **Near v. Minnesota**, 283 U.S. 697 (1931) -- the right to shut down a bookstore or a newspaper because of a single violation of an obscenity law. Assuming arguendo that a RICO/obscenity statute would be constitutional if it permitted closure because of the sale of one obscene item, Arizona simply does not have, nor is it required to have, that provision. **Leech v. American Bookseller's Association**, 582 S.W.2d 738, 745 (Tenn. 1979) (state can afford more protection to speech interests than the federal constitution mandates).

Under **Terminiello**, **supra** (requiring this Court to assume that the Arizona Court's construction was "as if the precise words had been written into" the statute), why is this matter in this Court? Is the statute in its present form somehow in conflict with the fed-

eral constitution? Arizona has the right to refuse to adopt any RICO or obscenity laws. Under **Terminiello**, **supra**, this Court must look at the statute as if the legislature wrote it as the Court of Appeals construed it. If the prosecutor does not like the statute in that form, his remedy is with the State legislature.

The Arizona Court of Appeals construed the statute according to Petitioner's (the State's) request. In the trial court, the State claimed that a proper construction of the statute's pre-judgment remedies would be that:

> "The State could move to restrain the sale of obscene items during the pendency, but the Defendants would be entitled to a hearing on each item and the State would have to prove the obscenity of each item."
>
> (Page 2 of the State's "Response to Motion to Dismiss Count One".)

The State also argued throughout that a proper interpretation of the pre-judgment remedies was that they would limit the State to an order preserving the status quo. See comments regarding the State's position in Opinion below, Appendix 58 to Petition. See also State's Response to Motion to Dismiss Count One, page 3; State's Opening Brief, page 5; and State's Supplemental Brief, page 10.

The interpretations of the pre-judgment remedies of the statute were adopted by the Arizona Court of Appeals. See pages 57-59 of Appendix to Petition.

Regarding post-judgment remedies, the State claimed that:

> ". . . §13-2314(D)(6)(c) allows only those proceeds that are traceable to the offense to be forfeited to the State."
>
> (Page 4, State's Response to Motion to Dismiss Count One.)

In its Supplemental Brief (its final brief), the prosecutor also claimed that the forfeiture of property provisions were being misinterpreted by Appellees (Respondents herein), and that:

> ". . . Arizona law would probably not 'authorize the post-judgment seizure' of 'other' films or magazines not yet determined obscene. A 'racketeering' defendant would thus be free to sell or rent his 'other' materials at the same or another location. . . ."
>
> (Page 12, State's Supplemental Brief.)

In the same brief it claimed that after judgment:

> ". . . the Arizona law does not provide for the forfeiture of materials not yet ruled obscene -- the defendant would be free to rent or sell his remaining materials at the same or another location. . . ."
>
> (Page 14, State's Supplemental Brief.)

The Arizona Court of Appeals adopted these readings of the post-judgment

remedies of the statute. See pages 62-66 of Appendix to Petition.

That court also made other rulings requested by the State, including holding that the RICO statute as applied to the predicate offense of obscenity was not vague, and that other parts of the RICO statute were constitutional.

The attempt by the State to review a decision of a state court upholding a statute by construing it in a manner suggested by the State itself is contrary to previous holdings of this Court barring certiorari when sought by the winning party. **Public Service Commission v. Brashear Freight Lines, Inc.**, 306 U.S. 204, 206 (1939). See also **Deposit Guarantee Bank v. Roper**, 445 U.S. 326, 333 (1980); **Gun v. University Committee**, 399 U.S. 383, 390, n.5 (1970); **Perez v. Ledesma**, 401 U.S. 82, 87, n.3 (1971).

The Arizona Court of Appeals, in construing the statute, did so on both federal and state constitutional grounds. However, this case presents a different situation than **Michigan v. Long**, 463 U.S. 1032 (1983). This is not just a case in which a ruling of a state court relies on both state and federal constitutional provisions and this Court must decide whether there are, in fact, independent state grounds, but rather is also a case in which a state court is asked by a state prosecutor to consider construing a state statute in a certain way, and after the court does so, the prosecutor complains to the federal court about it.

II. THE JUDGMENT OF THE ARIZONA COURT OF APPEALS IS NOT A FINAL JUDGMENT AND PROBABLY NEVER WILL BE.

Respondents have been indicted but not tried. Before all their motions were heard in the trial court, and in

fact before all their motions were even filed, the State appealed the trial court's dismissal of the RICO count. The dismissal was reversed by the Arizona Court of Appeals. The statute was upheld. The matter is now back in the trial court. The RICO count does not allege a predicate offense. Nobody knows what the Grand Jury thought the predicate offense was or even whether they thought one was required. Under Arizona law, a RICO charge must allege a predicate offense. **Baines v. Superior Court**, 142 Ariz. 145, 688 P.2d 1037, 1041, n.2, 1642-3 (App. 1984). When matters in this Court are terminated, Defendants will move to dismiss Count I in the trial court under **Baines**, **supra**. No one can predict whether Count One, the racketeering count, will ever come to trial, and if so, whether there will be a conviction under it.

Important on the finality issue is that the Arizona Supreme Court has not spoken on the issues and will have an opportunity to do so before a conviction becomes final. It simply denied review at a very early stage in the proceedings, perhaps because the case was just beginning. If the Respondents are ever tried on Count One and convicted, the Arizona Supreme Court has the power, which Respondents respectfully suggest this Court does not, to change the construction given to the statute by the Arizona Court of Appeals.

III. THE CONSTRUCTION OF THE STATUTE BY THE ARIZONA COURT OF APPEALS COMPORTS WITH THE ARIZONA CONSTITUTION AND THE UNITED STATES CONSTITUTION BECAUSE IT PREVENTS THE CLOSURE OF AN ENTIRE CHAIN OF BOOKSTORES OR VIDEO STORES BECAUSE OF THE SALE OF ONE OBSCENE ITEM.

The Arizona Court of Appeals was concerned that if one book in Respondents' store, or in a B. Dalton book-

store, or one R-rated movie in Respondents' store or in one of Maricopa County's over 500 video stores, was found to be obscene, an overzealous trial judge might interpret the RICO statute as giving him authority to close the store (or every B. Dalton bookstore in the state or even in the country). See page 62 of Appendix to Petition. The "enterprise" (corporation) would be convicted, not just one store, and it, not the store, would be subject to the statute's forfeiture, dissolution, injunction and closure remedies. See A.R.S. § 13-2301 et seq. (Appendix 4 of Petition).

This hypothetical case is not unrealistic. Arizona's statute reaches R-rated movies, i.e., simulated sex. See A.R.S. § 13-3501(6)(a) (Appendix 30-31 of Petition). It also reaches novels and magazines. See A.R.S. § 13-3501(2)

(Appendix 27 of Petition). B. Dalton bookstore sells Penthouse magazine. Penthouse magazine has previously been found to be obscene. **Penthouse International, Ltd. v. McAuliffe**, 610 F.2d 1353 [5th Cir. 1980]). R-rated movies have likewise been found obscene not only by trial courts, but state supreme courts. See **Jenkins v. Georgia**, 230 Ga. 726, 199 S.E.2d 183 (1973) (reversed 418 U.S. 153 [1974]). The Arizona Court of Appeals properly construed the statute under both state and federal law to prevent such outrages. **Near v. Minnesota**, 283 U.S. 697 (1931); **State v. Book-Cellar, Inc.**, 139 Ariz. 525, 679 P.2d 548, 555 (App. 1984).

CONCLUSION

The Court should deny the Petition, because the judgment is not final, the Arizona Supreme Court may yet speak on the issue, Petitioner was the prevailing party, the construction by the court was suggested by the Petitioner, and this Court, under **Terminiello**, **supra**, should not concern itself with constructions of state statutes by state courts.

Respectfully submitted,

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Three copies of the foregoing Response to Petition for a Writ of Certiorari to the Arizona Court of Appeals have been mailed this 3rd day of March, 1988, to:

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_____

William H. Howard

Supreme Court, U.S.
FILED
MAR 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF ARIZONA,

Petitioner,

—v—

STEVEN FELD, LARRY CHABLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Does Arizona's RICO statute, which provides for seizure of profits, proceeds and assets of racketeering enterprises, act as an unconstitutional prior restraint when used to seize nonobscene communicative matter?

2. Can a state, after a conviction based on obscenity as a predicate offense, constitutionally seek forfeiture of assets of the corrupt business which have not been adjudged obscene?

3. Can a state constitutionally order divestiture from racketeering enterprises which have been convicted of the illegal sale of obscene material?

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CERTIFICATE OF SERVICE

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Respondents have failed to address the questions presented by this Petition and do not contradict any of Petitioner's arguments. Instead they erroneously attack this Court's ability to decide the questions raised.

This Court has recently granted certiorari in a case presenting identical issues. See Fort Wayne Books, Inc. v. Indiana, No. 87-470 cert.

granted, March 7, 1988, sub nom. 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987).

Respondents present several arguments as follows: 1) that there was no final judgment and that the Arizona Supreme Court has not yet ruled; 2) that Petitioner is appealing a decision in which it not only was the winning party, but was successful in persuading the court to adopt Petitioner's favored construction of the statute; and 3) that the Supreme Court should not intervene in a state court's construction of a state statute. Petitioner is compelled to reply to Respondents' attempt to shift this Court's focus away from the issues raised in the Petition. Interestingly, they have not contested those issues.

1) The Arizona Supreme Court's denial of a petition for review allows the Arizona Court of Appeals decision to stand as the final judgment with regard to the issues presented in this Petition.

The ruling of the Arizona Court of Appeals declaring unconstitutional the use of certain RICO provisions in conjunction with obscenity proceedings became final when the Arizona Supreme Court declined to review the case, affirming the Court of Appeals. It is irrelevant to this Petition that the trial has not yet begun on the remaining criminal charges, or that more motions will be filed by the defense. There can now be no trial on the RICO/obscenity statute declared unconstitutional by the Arizona appellate courts. The state has been stripped of certain prosecutorial rights and remedies authorized by the statute. These issues have been finally resolved for all courts of the State of Arizona. The case is obviously ripe for

review by this Court and any contention to the contrary is simply disingenuous.

2) Petitioner is not the prevailing party on the provisions ruled unconstitutional, nor did Petitioner ever urge that provisions of the RICO statute be ruled unconstitutional when used in obscenity proceedings.

Respondents would have this Court believe that Petitioner, the State of Arizona, prevailed when portions of the RICO statute were declared unconstitutional. Further, Respondents would have this Court believe Petitioner desired that its statutes be ruled unconstitutional.

These propositions are absurd and Petitioner vigorously denies them. Petitioner's only success was in persuading the Arizona Court of Appeals to preserve at least a part of the challenged statute. Petitioner argued, as here, that the entire statute passed

constitutional muster. Petitioner does not appeal from the ruling upholding a part of the RICO statute; it seeks review of that portion of the ruling invalidating the remainder of the statute.

Petitioner never urged the Arizona Court of Appeals to rule unconstitutional any sections of the RICO statute. On the contrary, it asked the Arizona Court of Appeals to construe the statute in a constitutional manner, which it did, in part. But the Arizona court also ruled that certain provisions were unconstitutional. Specifically, the appellate court held that after a racketeering conviction in an obscenity case, it was unconstitutional to (1) order a criminal to divest of any interest in the corrupt enterprise, (2) restrict the criminal from future activities or investments in the same

enterprise, (3) order dissolution and reorganization of the enterprise, (4) empower courts to order forfeiture of interests or proceeds in the enterprise, to the extent those profits are derived from the sale of material not adjudged obscene, and (5) empower courts to seize property used to facilitate an offense, unless that property is itself contraband or traceable to racketeering proceeds. This invalidation was not urged by the State of Arizona.

A criminal convicted on four counts of first-degree murder but acquitted on one other murder count would not be considered the prevailing party before this Court. Although prevailing on one count, the criminal would still be a convicted murderer and have a right of appeal. Similarly, the fact that RICO in obscenity cases was not entirely struck does not supersede the many

important provisions of the statute ruled unconstitutional.

The cases cited by Respondents stand for the undeniable proposition that "(a) party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. [citations omitted.]" Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 333, 63 L.Ed.2d 427, 436 (1980). Contrary to Respondents' assertions, however, Petitioner clearly has not received all it has sought. The State of Arizona is aggrieved because its highest appellate courts have erroneously declared its statute unconstitutional on federal constitutional grounds.

3) This Court has jurisdiction over a state court's ruling that the federal constitution is violated by a state statute.

The Arizona Court of Appeals decision purported to rest on state and federal constitutional grounds. However, it did not purport to rest on independent state constitutional grounds. Furthermore, it is clear that the Arizona Court of Appeals was guided by Supreme Court precedent interpreting the federal constitution. The Court did not separately discuss or mention the Arizona constitution's protection of free speech. Under this Court's decision in Michigan v. Long, 463 U.S. 1032, 77 L.Ed.2d 1201 (1983), this Court clearly has jurisdiction to review the state court's decision. Respondents' argue that Michigan v. Long is different because in our case the state court construed the statute as requested by

the state. Petitioner denies that assertion (see Section 2 of this brief, supra) and otherwise fails to see the connection. Our case is analogous to Michigan v. Long.

Respondents also cite the 1949 case of Terminiello v. Chicago, 337 U.S. 1 (1949), for the proposition that a state court's construction of a state statute is "binding [on this Court] as though the precise words had been written into the ordinance." 337 U.S. at 4. Respondents argue that "this Court must look at the statute as if the legislature wrote it as the Court of Appeals construed it. If the prosecutor does not like the statute in that form his remedy is with the State legislature." Respondents' brief at 5.

In this argument, Respondents completely miss the mark. It is not the state court's construction of the

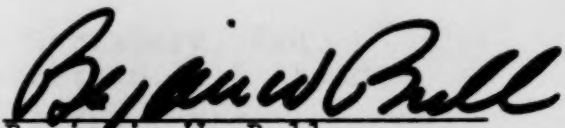
statute that is in question, it is the state court's interpretation of the federal constitution as applied to the statute that is in question. A state court's interpretation of the federal constitution clearly is reviewable by this Court. The issue of this case is not what the law means, but whether the law violates the federal constitution. Thus Terminiello is irrelevant to resolution of this case and does not affect this Court's jurisdiction. Petitioner does not contest that portion of the Arizona Court of Appeals decision which interprets what the statute means or declares a portion of it constitutional. Petitioner only contests the appellate court's understanding of the federal constitution as applied to the RICO statute, and specifically, that it is infirm under the federal constitution.

CONCLUSION

On March 7 this Court granted certiorari in the case of Fort Wayne Books, Inc. v. Indiana, No 87-470. That case involves issues identical to those of the instant case. The petition of Fort Wayne Books, Inc. notes that state courts are divided on these issues and specifically cites the decision of the Arizona Court of Appeals as a contrary ruling on the same issues, attaching the decision in the Appendix. See Petition for Writ of Certiorari to the Supreme Court of Indiana, Fort Wayne Books v. Indiana, No 87-470 at 20, and Appendix G. Petitioner herein respectfully prays

that this Court consolidate these cases in the interest of judicial economy and issue a writ of certiorari to the Arizona Court of Appeals.

Respectfully submitted,



Benjamin W. Bull
Attorney for Petitioner

I hereby certify that on this 18th day of March, 1988, three copies of the foregoing Petitioner's Reply in Support of Petition for Writ of Certiorari were sent by U.S. mail, postage prepaid, to:

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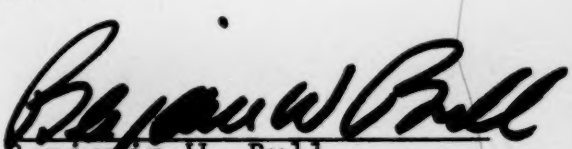
All Parties required to be served have been served.



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